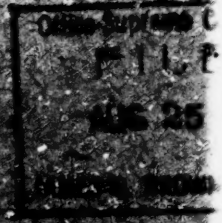

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 21

NEIL H. MCELROY, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA, EX REL. DOMINIC GUAGLIARDO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 33–55) is reported at 259 F. 2d 927. The opinion of the District Court (R. 20–32) is reported at 158 F. Supp. 171.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1958 (R. 55–56). The petition for a writ of certiorari was granted on February 24, 1959 (R. 57), 359 U.S. 904. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the light of the decision in *Reid* v. *Covert*, 354 U.S. 1, Article 2(11) of the Uniform Code

of Military Justice is severable so as to permit the court-martial of an employee of the armed forces serving with the armed forces overseas who commits non-capital offenses in a foreign country.

2. Whether Article 2(11) of the Uniform Code of Military Justice is constitutional as applied to a person employed by the Department of the Air Force and serving overseas who commits a non-capital offense in the foreign country.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The following provisions of the Constitution are involved:

> Article I, Section 8. The Congress shall have Power * * *
>
> Clause 14. To make Rules for the Government and Regulation of the land and naval Forces. * * *
>
> Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
>
> * * * * * *
>
> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The pertinent provisions of the Uniform Code of Military Justice, as codified in 70A Stat. 37, 10 U.S.C. 802, provide:

> ARTICLE 2. *Persons subject to this chapter.* The following persons are subject to this chapter:
>
> * * * * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.
>
> * * * * * *

3. The Act of August 10, 1956, c. 1041, Section 49(d), 70A Stat. 640, provides: [1]

> (d) If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

[1] This severability provision was not codified in Title 10. However, it was part of Public Law 1028, which was enacted into positive law as Title 10. It can be found in 10 U.S.C., p. 958.

STATEMENT

The respondent is a citizen of the United States who in March 1954 was employed by the Department of the Air Force at Nouasseur Air Depot, near Casablanca, Morocco (R. 7). He served with the Air Force as an electrical lineman and his duties consisted of maintaining and repairing air field lighting, inspecting and repairing electrical conduits, transformers, lights, controls, ducts, and manholes (R. 7, 11–12).

Although respondent did not live on the airbase (but in an apartment in Casablanca) he was entitled to a quarters allowance. He was also entitled to such other military benefits as commissary privileges, a United States Air Force ration card, privileges at the base exchange, officer's club membership, use of military payment certificates, and United States mail privileges (R. 12).[2] Medical and dental treatment at Government expense were available to him (R. 12). His basic pay of $506.88 per month was paid to him by the Department of the Air Force (R. 13).

On July 18, 1957, respondent and two enlisted men who were also stationed at Nouasseur Air Depot were charged with larceny in violation of Article 121 of the Uniform Code of Military Justice, 10 U.S.C. 921 (Charge I), and conspiracy to commit larceny in violation of Article 81 of the Uniform Code of Military Justice, 10 U.S.C. 881 (Charge II) (R. 13–15). These charges arose out of the theft of leatherette goods and

[2] Civilians employed by the Air Force within the continental limits of the United States do not have these privileges.

olive drab fabric material having a total value of approximately $4,690 from the Air Force Base Depot (R. 15).

On August 14, 1957, the charges were referred for trial to a general court-martial (R. 8). Respondent pleaded not guilty to the charges and specifications (R. 8). After a four-day trial, respondent and both of his codefendants were found guilty of all charges and specifications. He was sentenced to a fine of $1,000 and to confinement at hard labor for three years (R. 8). On review by the convening authority, the finding of guilty on Charge I (larceny) was disapproved because of an error in the instructions, but the sentence as adjudged by the court-martial was approved[3] (R. 8–9).

In December 1957, respondent, while confined in the base stockade at Nouasseur Air Base, Morocco,[4] filed a petition for a writ of habeas corpus in the District Court for the District of Columbia, alleging that the military authorities had no jurisdiction to try him by

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[3] Larceny of property of a value of more than fifty dollars in violation of Article 121 carries a maximum penalty of five years, Table of Maximum Punishments, MCM, 1951, p. 223. Conspiracy in violation of Article 81 carries the same maximum penalty as does the particular substantive offenses involved except that the death penalty may not be imposed. *Id.* at 219.

[4] Subsequent to the filing of the petition in the District Court, respondent was transferred to the U.S. Disciplinary Barracks, New Cumberland, Pennsylvania. He was admitted to bail pending appeal to the Court of Appeals, pursuant to an order of that court, and has been on bail since that time.

court-martial and that his confinement therefore was unlawful (R. 1–3).[5]

The District Court dismissed the petition (R. 32), but the Court of Appeals, one judge dissenting, reversed, and ordered that respondent be discharged from custody (R. 55–56).

SUMMARY OF ARGUMENT

I

In *Reid* v. *Covert*, 354 U.S. 1, this Court held that Article 2(11) of the Uniform Code of Military Justice is unconstitutional as applied to a dependent charged with committing a capital offense while accompanying a uniformed member of the military to a post in a foreign country. In an effort to decide the instant case on a non-constitutional basis, the majority of the Court of Appeals held that Article 2(11) was non-severable, that therefore the *Covert* decision was binding for all applications of the Article, and that the court-martial of respondent was invalid.

In *Covert*, the Court had before it for determination only the constitutional application of Article

[5] During the course of the proceedings in the courts below, automatic administrative review of the judgment by a board of review in the Office of the Judge Advocate General of the Air Force was had for the respondent and his co-defendants. As to Guagliardo, the finding of guilty as approved by the convening authority was sustained but the sentence was reduced to two years confinement at hard labor and the portion of the sentence imposing a fine of $1,000 was eliminated. The sentences of his two co-defendants were similiarly approved with a reduction in one case of six months. The petition of respondent to the Court of Military Appeals was denied on June 9, 1958. 26 C.M.R. 516.

2(11) to dependents "accompanying" our armed forces overseas, charged with a capital offense. The various opinions in *Covert* demonstrate that the Court's *decision* was limited to that precise issue. The present case involves the different situation of an employee of the Air Force, serving with the uniformed troops overseas, who was charged with and convicted after trial by court-martial of a non-capital offense. Nevertheless, the Court of Appeals rested its adverse determination on the twin principles that the "employed by" phrase of Article 2(11) was non-severable as between employees charged with capital offenses and those charged non-capitally, and also that this Court had decided in *Covert* that no civilian charged with a capital crime can be court-martialed. Both premises fail to take account of the narrowness of the actual holding of the Court. See, *e.g.*, 354 U.S. at 22–23, 45, 65.

The Court of Appeals likewise does not give proper and legitimate effect to the Congressional intention to include within Article 2(11) several separate and distinct classes of persons. The Uniform Code contains a severability clause which provides (1) that if a part of the Act were held invalid, the remainder should still remain effective and (2) that all valid applications of a part are to be severable from any invalid applications of the same part. The court below disregards the teachings of this Court that, in the face of this type of specific statutory separability provision, the proponent of inseparability has a heavy burden to overcome. In this instance, the statutory presump-

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ion is supported and confirmed by (a) the distinc-
ion, in fact and in Article 2(11) itself, between
ivilian dependents and civilian employees, (b) the
istinction between capital and non-capital charges,
nd (c) the development and legislative history of
rticle 2(11).

The court's reliance on *United States* v. *Reese*, 92
.S. 214, is inapposite; in *Reese*, the issue was the ap-
lication of a broad and general statute to specific
arrow situations, whereas in Article 2(11) the stat-
te itself particularizes its application into definite
ategories. Moreover, the *Reese* principle of insepa-
ability is no longer acceptable or followed.

II

We support the validity of Article 2(11) of the
niform Code of Military Justice, as applied to a
vilian employee of the armed services charged with
non-capital offense overseas, on the ground that Arti-
e I, Section 8, Clause 14 of the Constitution (provid-
g for the government and regulation of the land and
aval forces), read together with the Necessary and
roper Clause, empowers Congress to include such
vilian employees within the court-martial system.
n our view, that result is required by (a) the his-
rical development and meaning of Clause 14; (b)
e practical necessities for court-martial jurisdiction
er such persons; and (c) the unavailabilty or un-
esirability of suggested alternatives.

A. 1. There is solid indication in history that prior
and contemporaneous with the adoption of the Con-

stitution civilian persons employed by and serving with the armed forces were amenable to trial by court-martial. The test of such jurisdiction, historically, was not whether the person was a soldier wearing a uniform, but rather whether he had a sufficiently close connection with the military.

To guard against the threat of militarism to their liberty, the English evolved a political system of checks and balances, a keystone of which was the principle that the civil power was superior to the military at all times. This system was elaborated through the vehicle of the annual Mutiny Acts whereby Parliament, representing the civil power, determined the size of the army, appropriated the money for its use, and determined who would be amenable to its discipline. Since at least 1688 the British Articles of War—accepted by Parliament—have governed numerous persons other than uniformed soldiers; the armies comprised many functionaries and experts who were not soldiers, but who were connected with the army as a part of its apparatus.

The Articles of War which governed the Continental Army throughout the American Revolution also provided for military jurisdiction over several classes of non-uniformed persons. These Articles made amenable to trial by court-martial such civilian "experts" as commissaries, artillerists, and forage masters, as well as sutlers, wagon drivers, servants to gunners, camp followers, paymasters and others "serving with the army" who may not have been soldiers. Thirteen of the Articles adopted by the

Continental Congress in 1776 provided for the court-martial of persons serving with or connected with the army who were not uniformed soldiers. Winthrop, *Military Law and Precedents,* 2d ed., Reprint 1920, pp. 961–971. Specific provision was also made by the Continental Congress for the trial of persons who were described as being in the "Civil Department" of the Army. Journals of the Continental Congress, Vol. X, p. 72. This authority to court-martial was freely exercised throughout the Revolutionary period.

It was against this background that Clause 14, taken directly from the Articles of Confederation, was adopted by the Constitutional Convention. The framers made a deliberate decision to deal with the problem of militarism by placing the armed services under Congressional control, rather than by limitations on numbers or standing armies or the functions to be performed by the military. Hamilton in *The Federalist* explained that the powers to raise an army and prescribe rules for the land and naval forces "ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them." It was clearly contemplated that the power to make rules for the government of the land and naval forces would be subject to expansion and development under the Necessary and Proper Clause. Clause 14 was not tied to a confined and rigid compass.

It is therefore not surprising that the pre-Revolutionary pattern was repeated after the adoption of

the Constitution. The 1776 Articles, which were ratified by the first Congress, were applicable in many instances to persons who had some connection with the army but were not uniformed soldiers. In 1806, when the Articles were completely revised by Congress, provision was likewise made for the trial by court-martial of other than uniformed officers or soldiers. Each subsequent reenactment or revision of the Articles of War made provision for the court-martial of persons intimately connected with the army, irrespective of their status as soldiers. While the extension to civilians "accompanying" the armed forces first appeared in 1916, that phrase and its present successor in Article 2(11) of the Uniform Code merely follow this basic historical tradition.

It is true that certain of the early Articles were limited in their application to civilians serving with the army "in the field." However, others were not, and it would be a misconception to assume that the expression "in the field" means "time of war." Historically, the expression has covered those situations where the army is located in circumstances or areas in which the civil power of the home government cannot appropriately operate.

In accordance with this historical development, this Court and other federal courts have held that naval paymasters' clerks, who were clearly neither officers nor soldiers, were a part of the "naval service" for the purpose of court-martial jurisdiction. Likewise, the lower federal courts have consistently determined that for purpose of Clause 14 "it is not necessary that a

person be in uniform in order to be a part of the land forces". *Ex parte Jochen,* 257 Fed. 200, 204 (S.D. Tex.). These cases have covered civilian auditors working with the army, truck drivers, employees of the transport service, mechanics, cooks, etc.

2. Under these historical and judicially-accepted criteria, employees like respondent have a sufficiently close connection with the armed forces overseas to subject them to military jurisdiction. They can properly be considered by Congress to be a part of, and "in", the "land and naval forces" for the purposes of military criminal jurisdiction where our civil judicial power does not extend. Respondent is like the "sutlers", "retainers", "drivers", "wagonmasters", "gunners", "commissaries", "quartermasters", "forage masters", and "paymasters" who have been treated as liable to court-martial—even though not soldiers. His situation at an Air Force Base in Morocco was "in the field"—in the historical sense—especially since at that place "there is no Form of Our Civil Judicature in Force".

B. In addition, court-martial jurisdiction over civilians accompanying or serving with the armed forces overseas is a practical necessity.

1. There are large numbers of American civilians who must be abroad for the defense of the country. As of the present time, there are about 25,000 employees and 455,000 dependents in this category. The employees are, for the most part, essential experts; and the dependents are overseas because it is believed essential to morale for servicemen to have their families with them.

2. These civilians create problems of discipline which can only be solved through the exercise and existence of criminal jurisdiction. A substantial number of offenses are committed by them, and others would surely be committed if it were not for the deterrent of potential punishment. The civilians are truly a part of an integrated group. The whole visiting contingent—soldiers, sailors, airmen, civilian employees, and dependents—is in the eyes of the host state and in terms of the military needs of the United States one unit, for the conduct of which the military commander, who represents the effective power of the United States in the area, is responsible. This is recognized in the NATO Status of Forces Agreement, under which the United States has by treaty assumed the obligation to take necessary measures to assure that its whole contingent conforms to certain standards of conduct. The military authorities must therefore have power of control over the whole unit concomitant with their responsibility for the whole unit.

The Congressional judgment reflected in Article 2(11), that control over the entire visiting contingent is necessary, is supported by the actual experience in the field. As shown in the *Covert* case, Defense Department solicitation of the views of commanders in overseas areas has elicited the response that ability to perform the assigned mission would be seriously impaired if jurisdiction over accompanying civilians is lost. The terms under which accompanying civilians are allowed to enter the host state, the conditions under which they live—sometimes in a virtual enclave—the necessity for providing for their health

and welfare, all serve to interweave their activities with those of the military. The responsibility which overseas commanders must assume under these conditions cannot be divorced from power to supervise and control the whole group.

Certainly, effective control over civilian members of the visiting unit cannot be exercised without criminal jurisdiction. Overseas commanders meet the heavy responsibilities imposed upon them by promulgation of orders, regulations, and other directives applicable to the personnel of their commands, military and civilian. The power to enforce these directives promptly and locally by punishment, when necessary, is essential. It is a basic premise of our law that power to impose fines and imprisonment is the most effective governmental means of deterring infractions. If civilians may disobey directives without being subject to the punishment which could be imposed on the soldier in the same house, or at the next desk, manifest injustice would result.

All kinds of violations by the civilian part of our military contingents overseas—whether they result in assault, the neglect of security regulations, the introduction of narcotics, or black-marketeering—can affect the defense needs of the United States and the acceptability of our military contingents as visitors in a foreign land. The overseas commanders need to have authority available promptly and on the spot, if they are to carry out their duties.

C. To meet this need for appropriate criminal jurisdiction, there are no acceptable alternatives to the exercise of court-martial jurisdiction.

1. Trial in foreign courts is not a satisfactory sub stitute. A commander responsible for the whole un should not be expected to rely upon foreign authori and foreign courts to carry out the responsibili which the host country has indicated to be that of th United States, and which the United States has a sumed. Where injuries are to United States nationa by United States nationals, foreign authorities cou not be expected to be as interested in prosecution our own officials. Moreover, trial in a foreign cou would not solve the problem of violations of law an military regulations which are not offenses under th law of the foreign state. In particular, security vi lations would not be subject to foreign trial. Th commander's responsibility for the security of h base requires that law and order be maintained unde United States law. Also, to the extent that America offenders would be tried in foreign courts, the mode o trial and of punishment may, in many instances, b regarded as unsatisfactory from an American point o view.

2. Before American citizens could be compulsorily returned to this country for trial here of offense committed abroad, new agreements would probably have to be negotiated with each country concerned. An attempt to negotiate such new agreements would certainly be difficult for it would undermine the basis upon which our government now asserts jurisdiction—the connection of these persons with our armed forces. If they are not sufficiently connected for the military to have jurisdiction, then they can be said not to b

a part of our visiting military contingent, but in effect mere tourists, not in a status as to which any American court could or should assert control.

Irrespective of international agreement, the difficulties in trying Americans in this country for offenses committed abroad would doubtless preclude domestic trials, except in the most important or pressing cases. In addition to the expense and delay involved, it would be very difficult, if not impossible, to secure the attendance of foreign witnesses. These obstacles can perhaps be overcome in the occasional capital case; they cannot be overcome for the mass of lesser crimes committed by civilians serving with or accompanying the military abroad.

3. A proposal to have United States civilian courts sit in foreign countries and dispense justice according to United States civil law would probably be unacceptable to even the most friendly foreign nation. The long history of the struggle against extraterritorial courts in the Orient and Near East teaches this clearly. And even if the necessary agreement to the importation of American justice into the countries in which we maintain bases and establishments could be secured, such an agreement would not provide grand juries to indict, petit juries to try, competent counsel to defend, and compulsory process to secure the attendance of witnesses.

4. The last alternative is to refrain from sending civilian employees and dependents abroad. But to do so would require that this country be deprived of the services of many highly skilled persons, whose

specialties could often not be duplicated within the armed forces with their more limited financial incentives. It would further entail that our uniformed military personnel be deprived of the company of their families for the length of their tours of duty in foreign countries. The impairment of morale which would inevitably follow would further deplete the pool of manpower available for assignment abroad.

III

Essentially, the real choice is between a trial by an American court-martial and trial and punishment by a foreign court (or no trial at all). While all of the procedural safeguards of a trial by court-martial are not on a parallel with trial in an Article III court, the Uniform Code of Military Justice does represent the best effort of the Congress in the sphere of military jurisdiction to insure that every one in or connected with the military shall receive a fair trial, and, if found guilty, punished in conformity with our system of law. Paragraph by paragraph, and step by step, the Uniform Code of Military Justice and the Manual for Courts-Martial compare not unfavorably in most crucial respects with criminal trials in the states. While it does not offer a jury trial (unavailable also under most foreign systems of law), the Uniform Code of Military Justice—with its elaborate system of appellate review—does assure those who are a part of our military apparatus that they will receive a fair and just trial and, if convicted, will be punished in this country in accordance with our concepts of law and criminology.

ARGUMENT

I

THE "EMPLOYED BY" PHRASE OF ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE AS APPLIED TO ONE CHARGED WITH COMMITTING A NON-CAPITAL OFFENSE IS SEVERABLE FROM THE "ACCOMPANYING" PHRASE AS APPLIED TO CAPITAL OFFENSES

A. Subparagraph (11) of Article 2 of the Uniform Code of Military Justice (*supra*, p. 3) provides for court-martial jurisdiction of persons "serving with, employed by, or accompanying" the armed services overseas. The Court of Appeals, specifically refusing to place its decision on constitutional grounds, held that these jurisdictional classifications were not severable, and that, in light of the decision of this Court in *Reid* v. *Covert*, 354 U.S. 1, jurisdiction could not be sustained under the Article with respect to *any* non-uniformed person, whether accused of a capital or a non-capital offense. But in *Reid* v. *Covert*, 354 U.S. 1, this Court decided only that Article 2(11) cannot constitutionally be applied in time of peace to the trial of civilian *dependents* accompanying members of the Armed Forces of the United States to foreign countries who are charged with *capital* offenses. The Court did not hold that no "civilian" (*i.e.*, a person not an officer or enlisted man in one of the military services) may be tried abroad by courts-martial, nor did it rule that all of Article 2(11) was unconstitutional, or that it could not validly be applied to any non-uniformed person. In the principal opinion, Mr. Justice Black stated, for himself, the Chief Justice,

Mr. Justice Douglas and Mr. Justice Brennan (354 U.S. at 22–23):

> We recognize that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.

And the two concurring Justices were explicit in limiting the issue decided to the question of jurisdiction over dependents accompanying the armed forces overseas who commit capital offenses. Mr. Justice Frankfurter stated (354 U.S. at 45):

> In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question. The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a non-capital crime.

And Mr. Justice Harlan said (354 U.S. at 65):

> I concur in the result, on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace [footnote omitted].

See also 354 U.S. at 75–77.

In relation to *Reid* v. *Covert,* the present case *prima facie* presents two aspects of severability: (1) severability as between the three basic classes of persons covered by Article 2(11) (*i.e.*, persons serv-

ing with, employed by, or accompanying the armed forces), and (2) severability within each class between those accused of capital offenses and those of non-capital offenses. The court below determined, however, that respondent Guagliardo—an employee charged with a non-capital offense—was not amenable to court-martial for these reasons: (1) the considerations which brought about the decision in *Covert* apply as well to other civilians, such as civilian employees, who are tried on capital charges (R. 37); (2) the "employed by" phrase applies to all employees, without regard to the charge on which they are tried (R. 37); (3) the severability clause of the statute does not authorize the dividing of the "employed by" phrase as between those charged with capital offenses and those charged with non-capital offenses (R. 40–41); (4) accordingly, the entire "employed by" phrase is unconstitutional (R. 38, 40–41); and (5) the statute is invalid as applied to any offense committed by any civilian whether he be accompanying, serving with, or employed by the forces abroad.

As thus posed, the first problem is whether employees (as distinguished from dependents) can be tried by court-martial for capital offenses; the second problem is whether, in any event, within the "employed" class the situation of those who commit non-capital crimes (such as respondent Guagliardo) can be separated from that of those charged with capital offenses. The Court of Appeals treated both questions as if *Covert* compelled a negative answer. It assumed, first, that *Covert* had definitively decided

that *no* civilian—employee or dependent—charged with capital crimes can be court-martialed. This is, in itself, an erroneous construction of this Court's ruling. As noted above, Mr. Justice Black's opinion expressly refused to rule out the possibility of constitutional military trials for some classes of civilians (354 U.S. at 22–23). More, the two concurring Justices pointedly and painstakingly affirmed that their views were not to be taken as reaching beyond the immediate facts of the case of a *dependent* charged capitally, the only case before them (354 U.S. at 45, 65, 75–77).[6] Second, *Covert* certainly did not

[6] The Court of Appeals in *Grisham* v. *Taylor*, 261 F. 2d 204, at 205 (C.A. 3), No. 58, this Term, recognized that *Covert* had not decided anything as to employees. That court held that the severability clause controlled and placed a duty on the court to determine whether a constitutional difference existed between persons "serving with" or "employed by" from persons "accompanying" the armed forces overseas. The court rejected the *Guagliardo* view that, because a wife "accompanying" her husband overseas cannot be tried by courts-martial for a capital offense, *a fortiori* all persons "serving with" or "employed by" the military could not be so tried. And Judge Burger, dissenting below in the instant case, added an additional reason for not deciding the issue on the ground of severability (R. 44):

"Judicial caution, always appropriate in dealing with such far reaching matters as this, is especially in order where, as here, the joint action of the Legislative and Executive Branches under scrutiny deals with the national defense and delicate matters of foreign policy. The presumptions of constitutionality should not be quickly cast aside merely because a closely connected but legally unrelated portion of the same statute has previously been declared unconstitutional" (footnote omitted).

Two other courts which have had recent occasion to consider this problem have rejected the basic rationale of the majority

pass upon the issue of court-martial trials for non-capital cases, particularly for employees. There would have been little utility in the limitations in the various *Covert* opinions if the problem of non-dependent, non-capital, cases could be solved simply by saying that their category was non-severable from that in *Covert*. Certainly, the very precise limitations in the two concurring opinions could not be justified if the non-severability of Article 2(11) as applied to all persons and situations was plain for all to see. In short, *Covert* did not resolve the issue here.

B. As in other separability cases, the true problem is whether Congress intended that the distinct class of persons "employed by" the armed services should remain subject to court-martial jurisdiction for non-capital offenses, notwithstanding the invalidity of Article 2(11) as applied to another class, *i.e.*, "persons * * * accompanying" the armed forces abroad who commit capital crimes. This question must be answered affirmatively.

The Uniform Code of Military Justice contains a severability clause (Act of August 10, 1956, c. 1041, Sec. 49(d), 70A Stat. 640), which provides:

> If a part of this Act is invalid all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable in the invalid applications.

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of the Court of Appeals below. See *Wilson* v. *Bohlender*, 167 F. Supp. 791 (D. Colo.), No. 37, this Term, and *In re Yokoyama*, 170 F. Supp. 467 (S.D. Cal.).

The effect of a separability clause is to establish a presumption of effectiveness for any part of the statute which can be sustained, in lieu of the former general presumption to the contrary. *Williams* v. *Standard Oil Company*, 278 U.S. 235, 241–242. And this particular severability clause is explicit. First, Congress directed that, if parts of the Act were held invalid, the valid parts were to be severed and remain in effect. Secondly, valid applications of the Act were to be severable from invalid applications. It takes much more than mere conjecture to overcome the presumption of severability arising from such an all-inclusive clause. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312, teaches that:

> Under the non-statutory rule [where there is no severability clause], the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability.

See also 298 U.S. at 322 (Hughes, C. J., dissenting).

This burden cannot be borne by the respondent. *Prima facie*, there would be no reason to believe that Congress would have withheld court-martial jurisdiction over employees committing non-capital offenses if it had known that it could not properly subject dependents to court-martial for capital crimes. The classes are sufficiently different in make-up, function, numbers, and history to preclude their being automatically lumped together. And the legislative history of the Uniform Code—and of the Articles of War on which the Code is principally

based—substantiates the view that Congress would not have intended all of Article 2(11) to fall merely because the "accompanying" portion was invalid as applied to dependents in capital cases. As Congress was well aware, the word "accompanying" was added to the statute only in 1916, whereas the general phrase "serving with" had been in the Articles of War since the time of the Revolution. See the testimony of General Crowder, S. Rep. No. 229, 63d Cong., 2d Sess., p. 48. It cannot be said that, if Congress had known that this Court would hold that the persons coming within the then new jurisdictional classification of "accompanying" could not be tried by courts-martial in capital cases, it would have intended also to eliminate the traditional remainder of the jurisdictional article. So to construe Congress' intent is to impute a design to jeopardize by a new clause a retained provision which had been operative for many years. Surely Congress had no such destructive purpose.

It is also clear that the early rules of statutory construction announced by this Court in *United States* v. *Reese,* 92 U.S. 214, which were heavily relied on by the court below, are by their own terms inapplicable in this case. In *Reese,* Congress had drawn a broad penal statute. This Court refused to limit by judicial construction the broad general scope of the law to specific situations which were within constitutional bounds. This case might be analogous to *Reese* if Article 2(11) simply provided in general terms that all civilians abroad were subject to military jurisdiction. But Congress did not choose to announce such

a general grant of power. Instead, it broke down into categories the civilians it intended to reach. Thus, unlike *Reese,* this Court need not by judicial construction limit the language of the jurisdictional statute in order to sustain its constitutionality. The statute itself is so limited.

In any event, the approach employed in *Reese* is not now generally followed by the federal courts. Today, these problems of construction are not viewed as questions of how broadly Congress might have intended the inseparable coverage of the statute; rather, they are seen in the context of the particular fact situation in the particular case before the courts. As was stated in *United States* v. *Dennis,* 183 F. 2d 201, at 214 (C.A. 2), affirmed, *Dennis* v. *United States,* 341 U.S. 494:

> Even when there is no "separability" clause of any kind, the doctrine of *United States* v. *Reese,* 92 U.S. 214, 23 L. Ed. 563, does not always apply; the Supreme Court has often limited general words in a statute so as to make it constitutional, although in such cases a court must hazard the inference that Congress would have enacted the statute in the limited form, if it had known that in its broad scope it would be unconstitutional.[7]

A broadly worded statute should be limited, if necessary, to preserve its constitutionality. *The Abby*

[7] The court went on to say that there was no real hazard in inferring Congressional intent because of the severability clause. There, in the court's view (and in this case as well), the clause made it plain that Congress intended to govern "all cases which they constitutionally could."

Dodge, 223 U.S. 166, 175; *Crowell* v. *Benson,* 285 U.S. 22, 62; *American Power Company* v. *S.E.C.,* 329 U.S. 90, 107–108. And a specifically worded act should not be entirely cast out because some of its applications prove to be invalid. *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U.S. 419, 433–437; *United States* v. *Harriss,* 347 U.S. 612, 627; *United Public Workers* v. *Mitchell,* 330 U.S. 75, 103–104.

In sum, there is no legislative evidence to support any inference that Congress did not intend Article 2(11) to be severable, and under the modern doctrine the statutory separability clause is accordingly decisive. The rule quoted by the Court of Appeals as to the wisdom of refraining from constitutional pronouncements whenever possible is hardly a sufficient ground upon which to obviate what Congress commanded. *United States* v. *International Auto Workers,* 352 U.S. 567, 589. Congress has enacted that courts-martial shall have jurisdiction over three classes of civilians; and it has said that, if the grant of jurisdiction with respect to any one of these classes or the application of jurisdiction in a particular class exceeded its powers, such jurisdiction as remained valid should remain effective. In disregarding the Congressional intent and well-established rules of separability, the Court of Appeals committed clear error.

II

ARTICLE 2(11) OF THE UNIFORM CODE IS CONSTITUTIONAL, AT LEAST AS APPLIED TO A CIVILIAN EMPLOYEE OF THE ARMED SERVICES CHARGED WITH A NON-CAPITAL OFFENSE COMMITTED OVERSEAS [8]

We have shown in Point I that this case cannot be decided on principles of inseparability. The constitutional issue must therefore be faced here as it was in *Covert*. In that case, we supported the application of Article 2(11) of the Uniform Code of Military Justice to overseas service-wives—charged capitally—on two distinct theories: (a) that Congress was empowered by Article I, Section 8, Clause 14 of the Constitution (read with the Necessary and Proper Clause) to include such dependents within the court-martial system; and (b) that, apart from its constitutional power to make rules for the government and regulation of the military forces, Congress could properly base Article 2(11) on its foreign affairs powers. The majority of the Court rejected the second ground as support for Article 2(11), and held that the claimed Congressional power can rest only on the authority in Article I, Section 8, to regulate and control the armed services. So instructed, we confine our argument in the present series of four cases [9] to proof that Article I, Section 8, Clause 14 of the Constitution, together with the Necessary and Proper Clause,

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[8] The Government does not concede that a civilian employee charged with a capital offense is not amenable to court-martial under the Constitution. See *Grisham* v. *Hagan*, No. 58, this Term.

[9] The other three are: *Kinsella* v. *Singleton*, No. 22; *Wilson* v. *Bohlender*, No. 37; and *Grisham* v. *Hagan*, No. 58.

can and does sustain Article 2(11) as applied here.

Our submission will be that the historical and legal materials, together with the weight of the relevant interests and the practical considerations, tilt the balance squarely to that conclusion. We shall first discuss the historical and legal evidence as to the scope of Clause 14 (Point II, A, *infra*, pp. 28–71); then, the practical necessities for court-martial jurisdiction (Point II, B, *infra*, pp. 71–82); and, finally, the unavailability and undesirability of suggested alternatives (Point II, C, *infra*, pp. 83–101). We believe that each of these factors supports the validity of Article 2(11) under Clause 14, when it is read with the Necessary and Proper Clause. And since the Court in *Covert* did not authoritatively (as a Court) construe Clause 14, we shall necessarily retrace many of our arguments in that case.

A. HISTORY DEMONSTRATES THAT ARTICLE I, SECTION 8, CLAUSE 14 OF THE CONSTITUTION AUTHORIZES CONGRESS TO MAKE EMPLOYEES OF THE ARMED FORCES SERVING OVERSEAS, LIKE RESPONDENT, SUBJECT TO COURT-MARTIAL

1. *Civilians closely connected with the armed services as employees have consistently been subject to military jurisdiction both in England and in this country*[16]

a. *Pre-1789 practice*

The historical materials reflect a solid basis for the view that, prior to and at the time of the adoption of

[16] In addition to presenting some new material, we have attempted to incorporate, or refer to, all the relevant historical materials in our various briefs in the *Covert* case. See Brief for Appellant, pp. 32 ff.; Supplemental Brief for Appellant and

the Constitution, persons employed by and serving with the armed forces were amenable to trial and punishment by court-martial, although they were not soldiers wearing uniforms. The constitutional power "to make Rules for the Government and Regulation of the land and naval Forces" must be understood against this historical background.

(*1*) *English practice:* In 1689, after the accession of William and Mary and the adoption of the English Bill of Rights, Parliament passed the first Mutiny Act (1 Wm. and Mary, c. 5, Apr. 3, 1689), providing for the trial by court-martial of offenses which theretofore in time of war were punishable by death. See Clode, *Military Forces of the Crown,* Vol. I,[11] 142, *et seq.* (1869). The Act expired by its terms six months after its enactment, but thereafter it was renewed periodically. When the first Mutiny Act was passed, the army was governed exclusively under the Articles of War which had been promulgated by the crown. The Act made no reference to these Articles, but it expressly adopted the court-martial tribunals established under them. Clode, *supra,* at 146. Significantly, the Articles of War which then governed the army[12] made provision for the court-mar-

Petitioner on Rehearing pp. 64–82; Reply Brief for Appellant and Petitioner on Rehearing, pp. 23–61; and Supplemental Memorandum for Appellant and Petitioner Following Reargument, pp. 2–7. See also our brief in *Kinsella* v. *Singleton,* No. 22, this Term, at pp. 15–30.

[11] The first Mutiny Act is reprinted in full at Vol. I, p. 499, and in Winthrop, *Military Law and Precedents,* 929.

[12] These Articles are known as the Articles of War of James II. They were adopted by William and Mary when they assumed the throne after the "Glorious Revolution".

tial of commissaries, victuallers and sellers of spirits [13] who provided the army with supplies, food, and drink. Articles XLIV and XLVI, Winthrop, 926.

During the reign of George I, Parliament for the first time incorporated the Articles of War into the annual Mutiny Act. Act of 4 Geo. I, c. 4 (1718); Clode, *op. cit.*, 146–151; see also Winthrop, 930. Thereafter and through the time of the American Revolution, the Parliament, using the vehicle of the annual Mutiny Acts, supervised the details of the Articles of War and, as a consequence, was the authority which limited the persons and areas to which they were made applicable.

The Articles of War which governed the British Army at the beginning of the American Revolution were those adopted in 1765. Winthrop, 931, *et seq.* By express language these Articles were made applicable to:

> All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.[14]

This Article was designed to cover the numerous persons and classes of persons who attended upon the Army, but who were "no inlisted Soldiers." In the

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[13] That these commissaries, victuallers, etc., were not part of the uniformed force but were civilian "experts" more or less, attached to the army, is shown by Article XLV which provided that "No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion."

[14] Sec. XIV, Art. XXIII, Winthrop, 941.

language of E. Samuel in his *Historical Account of the British Army, and of the Law Military* (London, 1816), at 691–692:

> Armies, serving in the field, are at all seasons accompanied by a long train of followers, administering to the support, comfort, and convenience of the troops—some of them public functionaries, such as commissaries, contractors, and their subordinates; and others, of a private condition, as victuallers, shopkeepers, and private dealers, with servants or attendants, attached to the service of the camp, or of individuals retained in it; the number of these different classes of persons bearing a great proportion often to the numbers of those contained in the ranks of armies. These various descriptions of persons live within the boundaries of the camp, have their appointed stations in it, and their persons and their property guarded alike with the soldiery: they are stationary as it is stationary, and move whenever it moves; all their dealings and transactions are with the military state: and their peace and quiet is so intimately connected with that of the military body, that the one cannot be disturbed without the other. Being so blended together in their local situation, in their concerns, and their interests with the soldiery; it would seem almost impracticable to govern them by any other than a law common to them both: and the ordinary law, being wholly incompetent in its provisions and means to the military state and its affairs; which is admitted, in the formation by the legislature of separate and especial regulations for its government;

> and there being neither civil courts, nor instruments in the camp for the administration of the ordinary laws; and in foreign countries, the common field of operation to our armies, the laws themselves being wanting, the temporary sojourners, and voluntary members of the camp, are thrown, from absolute need, under the influence of the prevailing law (for it can hardly be insisted that they could be safely left to themselves); whence alone results an uniform and consistent rule, and reciprocal protection.

These same Articles provided that conductors, gunners, matrosses, drivers, or other persons receiving pay or hire in the service of the artillery were to be tried by courts-martial in like manner as officers and soldiers (Sec. XVIII, Art. I). Winthrop, 945. These provisions are important because at the time of the American Revolution artillerymen and the drivers of their wagons were not soldiers or uniformed troops but "civilian" experts. *Encyclopedia Britannica,* Vol. 8, p. 448; *Encyclopedia Americana,* Vol. 2, p. 364;[15] and see *infra,* p. 37 *ff.* Moreover, ten other articles covered and made amenable to courts-martial other classes of persons serving with or accompanying the

[15] The origin and history of the Royal Artillery is detailed by Clode in his *Military Forces of the Crown* (Vol. I) at pp. 266–268; while the Honorable Artillery Company of London is the oldest corps in Great Britain, in 1782 "they offered their services as a Military body without pay, in such manner as His Majesty should be pleased to command, for the defense of the metropolis and its environs, although they had no rank assigned to them in the Military forces of the Crown." *Id.*, p. 404.

army who were not uniformed troops.[16] Article II of Section XX, after which Article 2(11) of the Uniform Code is directly patterned, provided for the punishment by court-martial of all persons serving certain garrisons overseas *"where there is no Form of Our Civil Judicature in Force."* Winthrop, 946 (emphasis added).

The applicability of these Articles to civilians as well as to military personnel is carefully detailed by Colonel Winthrop at pages 102–104 of his classic work. While we take issue with his statement that these Articles would only be applicable in time of war (see *infra*, p. 52 *ff*), there is no gainsaying the evidence which he adduces to establish their broad applicability. They amply demonstrate that provision by the legislature for the trial by court-martial of persons "in civil life" was not repugnant to the English concept of liberty at the time of, and preceding, the American Revolution.

(2) *Colonial and Revolutionary Practice:* (*i*) The first Articles of War in this country were those

[16] Section IV, Articles V and VI, were applicable to commissaries; Section VIII, Article I, was applicable to sutlers, and Article II of the same section regulated "All Officers, Soldiers, and Suttlers"; Section XIII, Article I, provided for trial by general court-martial of store-keepers and commissaries, as well as of commissioned officers, for embezzlement, misapplication or loss of provisions or ammunitions, etc. Section XIV, Article IX, provided for court-martial jurisdiction with respect to certain offenses over "[a]ny person belonging to Our Forces employed in Foreign Parts * * *". Articles XIV and XV of this section, except only for the conduct proscribed, are practically identical with this Article and so are Articles XVII, XVIII, and XIX of this same section. Winthrop, 933–940.

adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775 (Winthrop, 947). These Articles, which initially governed the "civilian" army of farmers and tradesmen—the Minute Men—who commenced the War of the Revolution, were made applicable to "all Officers, Soldiers, and others concerned," and in Article 31st particularly provided:

> All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army. [*Id.*, p. 950.]

There were five other Articles which contemplated the trial and punishment (including the death penalty) by court-martial of others than uniformed soldiers serving with the army.[17]

The American Revolutionary Army was initially governed by Articles of War adopted by the Continental Congress on June 30, 1775. Journals of the Continental Congress, Vol. II, p. 111.[18] Nine of the original sixty-nine Articles provided for the trial by court-martial of those who were part of the army's operation and who were not soldiers or officers.[19] Subsequently, these Articles were revised and new Ar-

[17] Articles 21, 25, 26, 27, 39 and 47. Article 47 was applicable, *inter alia*, to "any other person whatever, receiving pay or hire in the service of the Massachusetts Artillery * * *".

[18] These Articles, with additional Articles enacted November 7, 1775, are reprinted in Winthrop, 953, *et seq.*

[19] Articles XXII, XXVI, XXVII, and XXVIII provided for the trial by court-martial of persons "belonging to the continental army" who had committed the offenses proscribed by the respective Articles; Articles XL and LIV governed the punishment of persons who would interfere with a court-

ticles were adopted by the Continental Congress on September 20, 1776.[20] With the exception of certain minor revisions, which are not pertinent, the Revolutionary Army was governed by these Articles for the balance of the war.[21] Winthrop, 22. Thirteen of the

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martial proceeding, either by menacing or disturbing its proceeding (Article XL), or by refusing to testify when called as witnesses (Article LIV). Article LX provided for the punishment of commissaries who had been convicted of taking "any gift or gratuity on the mustering" of any regiment or troop, etc. The civil character of commissaries is evidenced by the comparison of this Article with Articles LIX and LXI, immediately preceding and following it, which cover the punishment of officers as differentiated from commissaries. Of particular interest are Articles XXXII and XLVIII, which were directly patterned after the British Articles referred to above, and which provided for jurisdiction over "All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers" (Article XXXII) and over "All officers, conductors, gunners, matrosses, drivers, or any other persons whatsoever, receiving pay or hire, in the service of the continental artillery * * * in like manner with the officers and soldiers of the Continental troops" (Article XLVIII).

[20] These Articles are reprinted in Winthrop, 961–971.

[21] The Articles were prepared principally by John Adams, who described their enactment (John Adams, *Works*, Vol. 3, pp. 83–84):

"In Congress, Jefferson never spoke, and all the labor of the debate on those articles, paragraph by paragraph, was thrown upon me, and such was the oposition, and so undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause, that to this day I scarcely know how it was possible that these articles could have been carried. They were adopted, however, and have governed our armies with little variation to this day [June 7, 1805]."

In preparing these Articles and in working for their adoption, Adams steadfastly maintained that they were based on the cardinal principle that military power must always be subordinate to civil authority (*id.*, p. 87).

1776 Articles made provision for the trial of persons serving or connected with the army who were not officers or soldiers.[22]

In 1778, one pertinent addition was made (Journals of the Continental Congress, Vol. X, p. 72):

[22] Section IV, Article 6, provided for the punishment of commissaries, members of the civil branch, who were convicted of receiving money or other gratuity on the muster of a regiment; Section VIII, Article 1, governed the conduct of suttlers, and Section XII, Article 1, provided for the general court-martial of store-keepers and commissaries, as well as commissioned officers, for the embezzlement or loss, etc., of provisions, ammunition or other military stores belonging to the United States. Similar to the British Articles of 1765, and the American Articles of 1775, Section XIII, Articles 9, 14, 15, 17, 18, and 19, made provision for the court-martial and punishment of persons "belonging to the forces employed in the service of the United States" (Art. 9), or "belonging to the forces of the United States" (Arts. 14 and 15) or "belonging to the forces of the United States, employed in foreign parts" (Art. 17) and "whosoever" (Arts. 18 and 19). From examination of these particular Articles in their context and a comparison with the other Articles which were made applicable to "soldiers" and "officers," it is readily apparent that they were not limited in their applicability to the uniformed troops. Section XIV, Articles 6 and 14, dealt with the conduct of persons who refused to testify when called as witnesses before a court-martial (Art. 6) and punishment of threats of or disturbances to a court-martial then sitting (Art. 14). Article 23 of Section XIII covered all "suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no enlisted soldier," and Article I of Section XVI subjected to military jurisdiction all "officers, conductors, gunners, matrosses, drivers, or any other persons whatsoever, receiving pay or hire in the service of the artillery of the United States." In all substantial respects these two Articles are similar to the Articles covering the same subject adopted by Congress in 1775 (*supra*, p. 34) and to the British Articles of 1765 (*supra*, pp. 30–33).

> *Resolved,* That every person employed either as Commissary, Quarter Master, forage Master, *or in any other Civil Department of the Army* shall be subject to trial by Court Martial for neglect of duty, or other offense committed in the execution of their office, and upon conviction shall suffer death, or such other punishment as shall be adjudged by sentence of such Court Martial. [Emphasis added.]

This provision recognizes the amenability to trial by court-martial of those persons who by reason of their employment, though not uniformed soldiers, were considered to be a part of the army's "Civil Department". As understood by the Continental Congress, the test of court-martial jurisdiction was *direct connection* with the army, not whether a person was a "soldier" or "civilian".[23]

(*ii*) As already noted, this test of jurisdiction (which was not reluctantly exercised) is illustrated by many examples. Wagon drivers "receiving pay or hire" in the service of the artillery had been made subject to court-martial jurisdiction under the British Articles of 1765 (Sec. XVIII, Art. I, Winthrop, 945, *supra*, p. 32), the American Articles of 1775 (Art. XLVIII, Winthrop, 957, fn. 19, *supra*, pp. 34–35), and the American Articles of 1776 (Sec. XVI, Art.

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[23] Another example of the broad view which the Continental Congress had of the reach of the court-martial power is discussed, in some detail, in the Government's Reply Brief in the *Covert* case, pp. 58–60, and its Supplemental Memorandum Following Reargument (in *Covert*), at pp. 2–7. The example concerns acts of the Continental Congress subjecting civilians to trial by court-martial for improper conduct before a court-martial. See also footnote 22, *supra*, p. 36.

I, Winthrop, 970, fn. 22, *supra*, p. 36). During the Revolutionary period, such drivers, and even the artillery gunners, were not enlisted soldiers, but civilian experts. "Horses or oxen, with hired civilian drivers, formed the transport" for the cannon. Manucy, *Artillery Through the Ages* (G.P.O. 1949), p. 10. Their status in Washington's army is shown by the following entry made August 22, 1777, by General George Weedon in *Valley Forge Orderly Book of General George Weedon of the Continental Army under Command of Genl. George Washington, in the Campaign of 1777-8* (pp. 14–15):

> As the Congress never have & the Genl. is persuaded never do Intend to give Rank to any of the Waggon Masrs. in this Army, except the Waggon Masr. Genl., They are order'd not to Assume the title of Majors Captains &c. but to be Distinguish'd by the names of Division or Brigade Waggon Masrs. as the case may happen to be, Waggon Masrs. are useful in every Army & will be supported in all their Just Priviledges, but the way for them to obtain respect is by a diligent & faithful discharge of their respective Duties without favour or Affection to anyone.

Louis de Tousard's *American Artillerist's Companion* (1809), Vol. 2, pp. 625–670, contains an excellent index or vocabulary of the various terms then in prevalent usage in the artillery. His definitions indicate the non-uniformed or "civilian" capacity of those classes of persons:

> DRIVERS, of baggage or artillery, men who drive the baggage, artillery and stores, and have no

other duty in the army. In the French service this duty is performed by battalions of the train. [P. 635.]

MATROSSES. *Servants,* assistants to the gunners, *cannoniers.* [P. 645.]

WAGONER (*charretier,* fr.) one who drives a wagon. *Corps of* WAGONERS, (*corps de charretiers,* fr.) a body of men employed in the commissariate, so called. This duty is performed at present among the French by battalions of the *train.* * * * [P. 668.]

The paymasters and commissaries of the Revolutionary Army were likewise persons over whom military jurisdiction was consistently exercised. The commissary had the duty of purchasing stores; he was a civilian appointed by the Congress with the major function of securing the purchase of and payment for the necessary supplies and equipment for the army.[24] Article LX of the Articles of War of 1775 provided for the displacement from office and forfeiture of pay of any commissary who was convicted (by court-martial) of taking any gift or gratuity on the mustering of any regiment or on the signing of any muster roll. Winthrop, 958. The Articles of 1776 are replete with instances of the amenability of commissaries and keepers of stores to court-martial jurisdiction. See *e.g.,* Sec. IV, Arts. 5 and 6, and Sec. XII, Art. 1, Winthrop, 962, *et seq.*

[24] Following the British system the commissaries received a percentage of all money spent by them on the Army's behalf as their "commission." Cr nau, *The Army of the American Revolution and Its Organizer* (1923), p. 28.

The non-uniformed status of these and comparable individuals is concretely illustrated in the report and recommendations, dated January 29, 1778, which Washington made to the Committee of Congress With The Army:

> *As it does not require military men*, to discharge the duties of Commissaries, Forage Masters and Waggon Masters, who are also looked upon as the money making part of the army, no rank should be allowed to any of them, *nor indeed to any in the departments merely of a civil nature*. Neither is it, in my opinion proper, though it may seem a trivial and inconsequential circumstance, that they should wear the established uniforms of the army, which ought to be considered as a badge of military distinction. [*Writings of Washington*, Vol. 10, p. 362 at 379.] [Emphasis added.]

Nevertheless, the subjection of commissaries to military jurisdiction and punishment is made clear by the instructions issued by General Washington on October 18, 1778:

> * * * The mode of treating the Commissaries and their Assistants in case of neglect of duty or misdemeanour is pointed out in the resolve of Congress made for the regulation of the Department, which directs that they be tried by a Court Martial by order of the Commander in chief, or Genl Officer commanding a post. [*Writings of Washington*, Vol. 13, p. 103.] [25]

[25] Instances of the exercise of military jurisdiction over persons in these positions are detailed in *Washington's Writings:* On January 22, 1778, Thomas Scot, a wagon master, was

b. *The Constitutional Convention*

The principal debates in the Constitutional Convention were not concerned with authority to govern the military forces. The language of Article I, Section 8, Clause 14, is taken directly from the Articles of Confederation. Prescott, *Drafting the Federal Constitu-*

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tried by court-martial and acquitted. Vol. 10, p. 359. On May 25, 1778, William Whiteman, described as a "waggoner", was sentenced. Vol. 11, p. 487. And on September 2, 1780, Joseph Smallwood, another "waggoner", was convicted after trial by court-martial and sentenced. At the same time, an express rider was convicted and the court martial sentenced him to a flogging and dismissal from the service. Vol. 20, pp. 24-25.

On July 17, 1778, a Mr. James Davidson, described as Quarter Master of Col. James Livingston's regiment, was tried by court-martial and convicted of defrauding the soldiers and embezzling Continental property. Vol. 12, p. 232. On October 1, 1779, a Benjamin Ballard, an assistant "Commissary of Issues" was tried by court-martial for selling food and provisions, etc., without orders or authority to do so and another assistant "Commissary of Hides" was tried for giving a pass to a soldier without authority. Vol. 16, pp. 385-386. On September 27, 1780, one Abraham Cooper, waggoner, was tried by court-martial for embezzling public stores and acquitted. Vol. 20, p. 96. On December 16, 1780, a Benjamin Stevens, a commissary, was tried by general court-martial at West Point, Vol. 21, p. 19, and on December 16, 1780, one Thomas Dewees, a barrack master, was tried by general court-martial on five charges. Vol. 21, pp. 22-23. On February 5, 1781, an instance is recorded of the ordering of a general court-martial to be convened to try one John Collins, an assistant deputy commissary. Vol. 21, p. 190.

On February 24, 1778, a forage master was convicted after trial by court-martial of violating Art. 5, Sec. 18 of the Articles of War and ordered dismissed from the Army. Vol. 10, p. 507. On October 10, 1778, the execution of a sentence imposed on a civilian for counterfeiting was approved, Vol. 13, p. 54, and on November 23, 1778, approval was given to the conviction

tion (1941), p. 526; 5 Elliott's Debates 443.[26] The meaning of the clause in those Articles is plainly reflected in the historical materials we have just canvassed (*supra*, pp. 28–41).

The controversy in the Constitutional Convention centered on whether there would be a standing army or whether the militia of the various states would be the source of military power. Prescott, *supra*, pp. 515–525; 5 Elliott's Debates 443–445. On the one hand, there was the fear of a standing army as being detrimental to liberty; on the other was the necessity of such an army for the preservation of peace and defense of

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and sentence by court-martial of an express rider, who was tried and convicted of stealing. Vol. 13, p. 314.

Reference to the *Orderly Book* of Gen. George Weedon, *supra*, p. 38, also shows that during the campaign of 1777-78 in Washington's Camp at Valley Forge the trial by court-martial of classes of persons who were not soldiers or officers was not uncommon. On August 20, 1777, Jacob Moon, "Pay Masr. to 14th V. Regt.", was convicted after trial by court-martial. *Id.*, pp. 9–10. On January 3, 1778, John McClure pleaded guilty before a court-martial to a charge of suttling in camps contrary to general orders. *Id.*, p. 177. On January 5, 1778, Dunham Ford, a commissary, was found guilty after trial by court-martial of theft and was sentenced to pay a fine of $200.00 and to be mounted backwards on a horse, without saddle, his coat turned wrong side out, hands tied behind him, and drummed out of camp. *Id.*, p. 180. And on March 10, 1778, a civilian adjutant of the "13th Virga. Reg." was tried by court-martial "with his own Consent." *Id.*, pp. 252–3. Lt. John Marshall, later Chief Justice of the United States, served as Deputy Judge Advocate in the prosecution of these cases, having been appointed November 20, 1777. *Id.*, p. 134.

[26] The clause was included in the final draft of the Constitution without discussion or debate. Neither the original draft presented to the Convention nor the draft submitted by the Committee of Detail contained the clause. 5 Elliott's Debates 130, 379.

the country. Coupled with this was the maintenance of the militia as a protection against the usurpation of power by the national government. Glenn and Schiller, *The Army and the Law,* pp. 14, 18–20. These views were reconciled by taking over the concept embodied in the British Mutiny Acts (*supra,* pp. 29–33)—that is, that the Congress, epitomizing the civil authority, rather than the commander-in-chief or the military officers, would control the size and functions of the standing army. This was accomplished by a provision that no appropriaton for the support of the army could be made for a longer period than two years (Article I, Sec. 8, Cl. 12), and by the continuance of the militia "according to the discipline prescribed by Congress" (Article I, Sec. 8, Cls. 15 and 16, and Amendment II). As summed up by James Madison in *The Federalist,* No. 41:

> Next to the effectual establishment of the union, the best possible precaution against danger from standing armies, is a limitation of the term for which revenue may be appropriated to their support. This precaution the constitution has prudently added. * * *

Thus, it was the basic decision of the Constitutional Convention that effective protection against the sort of military abuses which had been suffered in the past at the hands of the British crown was to be accomplished by making the military subject to the control of the popularly elected legislature, rather than by specific constitutional limitations. All constitutional restrictions on the size of the army were voted down; the simple solution was to give the power to raise and support

armies not to the Executive but to Congress. See Hamilton, *The Federalist,* No. 24. The power to make rules for the government and regulations of the military and its components was also given to the Congress. The framers evidently believed that, by following the British system of placing the power to raise and determine the size of the army in the legislature, and by limiting appropriations to two years, they had succeeded in obviating the danger of military supremacy to the destruction of the liberties of the people.[27]

In *The Federalist,* No. 23, Hamilton discussed the military powers which would be given to the federal government by the Constitution then under consideration by the states. In explaining the power given Congress to make rules for the government of the army and the navy, he stated that this power properly was left without limitation so that Congress could use a great variety of means to meet changing circumstances:

> The authorities essential to the care of the common defence, are these: to raise armies; to build and equip fleets; *to prescribe rules for the government of both;* to direct their operations; to

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[27] Though these concepts and provisions were vigorously debated during the period prior to the Constitution's ratification (Beveridge, *The Life of John Marshall,* Vol. 1, pp. 391, *et seq.*), there apparently was no debate or criticism of the authority given to Congress by Clause 14. In the light of the recent Revolutionary War and the fact that so many had been a part of the army, it must be concluded that there was knowledge that other than uniformed soldiers were included in this authority granted to Congress. This is implicit in Alexander Hamilton's recognition of "standing armies, and the correspondent appendages of military establishment". *The Federalist,* No. 8.

provide for their support. *These powers ought to exist without limitation; because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.

* * * * *

* * * Shall the union be constituted the guardian of the common safety? Are fleets and armies, and revenues, necessary for this purpose? The government of the union must be empowered to pass all laws, *and to make all regulations which have relation to them.* * * *

* * * * *

Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that it is both unwise and dangerous to deny the federal government an unconfined authority in respect to all those objects which are entrusted to its management. * * * A government, the constitution of which renders it unfit to be entrusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the national interests. Wherever these can with propriety be confided, the coincident

powers may safely accompany them. [Emphasis added.]

This is a clear and authoritative statement that the power to make rules for the government of the armed forces was intended to give Congress the authority to use means the "extent and variety" of which it was "impossible to foresee or to define".[28] Congress was to have the power "to make all regulations which have relation to" the fleets or the armies. Thus, the authority conferred by Article I, Section 8, Clause 14, like the other enumerated powers, was plainly to be read in conjunction with the Necessary and Proper Clause as a grant susceptible of expansion and adaptation as circumstances changed. Clause 14 was not thought to be tied to a confined and rigid compass. The controlling doctrine of *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, 411–412, 421, 423, was to be fully applicable. See the opinions of Justices Frankfurter and Harlan in *Covert,* 354 U.S. 1, 43–44, 67–69, and the Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert,* at pp. 69–76.[29]

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[28] Hamilton was a distinguished army officer (aide-de-camp to Washington) who undoubtedly knew that civilians in certain circumstances were subject to court-martial jurisdiction.

[29] Nothing in the history of the Fifth and Sixth Amendments detracts from this conclusion. The journals of the state and federal conventions fail to disclose anything tending to show a relationship between the Sixth Amendment and Article I, Section 8, Clause 14. In the majority of the state conventions, the debates centered on the failure of the Constitution to provide for trial by jury in civil cases. 2 Elliot's Debates 515; 4 Elliot's Debates 143, 151; *The Federalist,* No. 83. The ex-

Moreover, the constitutional term "land and naval Forces" was not synonymous with "armed forces" or "armed services". See Cong. Globe, 37th Cong., 3d Sess., 995, *et seq.* The early forces of England included the mariners of the merchant vessels in which the servicemen were transported (45 U.S. Naval Institute Proceedings 355, 367); the ancient Court of Chivalry heard the cases of nonmilitary persons connected with the armies (9 U.S. Naval Institute Proceedings 692, 694–696); noncombatants accredited by military authority have been treated when captured as part of the land forces (Geneva Convention Relative to Treatment of Prisoners of War (1949), Art. 4A (4)).[30]

c. *Development of the Articles of War Subsequent to the Adoption of the Constitution*

Immediately after the formation of the Government under the Constitution, Congress adopted the existing Articles of War, which were essentially the Articles of 1776. Act of September 29, 1789, c. 25, Sec. 4, 1 Stat. 96. By this Act, Congress approved those provisions set forth above (*supra,* pp. 34–36) which conferred military jurisdiction over persons consid-

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ception, incorporated in the Fifth Amendment, for "cases arising in the land and naval forces" was apparently not a subject of controversy. This Court has said that the power given to Congress to provide for trial and punishment of military offenses under Article I, Section 8, and the judicial power of the United States "are entirely independent of each other". *Dynes* v. *Hoover*, 20 How. 65, 79.

[30] See also *Johnson* v. *Sayre*, 158 U.S. 109, discussed, *infra*, pp. 61–62; and the materials collated, *supra*, pp. 29–42.

ered to be an integral part of the military forces, although neither officer nor soldier. Thereafter, by the Act of April 30, 1790, c. 10, Sec. 13, 1 Stat. 121, the Articles of War were specifically made applicable to "commissioned officers, non-commissioned officers, privates and *musicians*". (Emphasis added.)

In subsequent Articles, provision has invariably been made for the exercise of court-martial jurisdiction over "retainers" and other personnel serving with the army in the field who are not soldiers. In the first complete enactment of the Articles subsequent to the adoption of the Constitution—that of April 10, 1806—Article 60 (2 Stat. 366) in effect reenacted the provisions for jurisdiction over sutlers, retainers, and "all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers". These Articles of 1806 were considered at length before their adoption. 15 Annals of Cong., 9th Cong., 1st Sess., pp. 264, 326–327, 338. In addition to Article 60, they contained eight other provisions providing for the trial by court-martial of other than uniformed officers or soldiers. Winthrop, 976, *et seq.*[31]

[31] Article 29 made provision for the regulation of sutlers; Article 36 provided for a general court-martial of store-keepers and commissaries as well as of commissioned officers who should be convicted of having embezzled, misapplied, etc., property, arms, of stores belonging to the United States; Article 53 provided for the death penalty upon the sentence of a general court-martial of "[a]ny person belonging to the armies of the United States" who should be convicted of making the watch word known to any other person; Article 55 provided that "[w]hosoever, belonging to the armies of the United States, employed in foreign parts, shall force a safeguard, shall suffer death"; Articles 56 and 57 provided for the court-martial of all

Of particular note is Article 87, which demonstrates the intention of Congress that these Articles of War would be applicable to, and trial by court-martial would be appropriate for, others than uniformed soldiers. This Article provided:

> No person shall be sentenced to suffer death, but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be inflicted on any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or *follower of the army,* shall be tried a second time for the same offence. [Emphasis added.]

Provisions similar to Article 60 of the Articles of 1806, dealing with court-martial jurisdiction over retainers and other personnel serving with the army in the field, have been made in all subsequent reenactments of the military code: In the revision of 1874, Rev. Stat. (2d ed. 1878), p. 236 (Article 63); in 1916, 39 Stat. 651; in 1920, 41 Stat. 787; and in the adoption of the Uniform Code of Military Justice, 64 Stat. 109, codified in 70A Stat. 37, 10 U.S.C. 802(11).

In 1916, during a general revision of the Articles of War, Congress used phraseology which is substantially equivalent to that of present Article 2(11).

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persons—denominated "[w]hosoever"—to indicate the inclusion of more than officers or enlisted soldiers; and Article 96 provided that the Articles applied to all "officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay, or hire, in the service of the artillery, or corps of engineers of the United States."

No new constitutional concept was thought to be adopted; the military jurisdiction which had previously been recognized was clarified by the reenactment. In the language of General Enoch H. Crowder, then Judge Advocate General of the Army, Hearings before the House Committee on Military Affairs, 62d Cong., 2d Sess., on H.R. 23628, p. 61:

> There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission.[32]

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[32] General Crowder also said (see S. Rep. No. 130, 64th Cong., 1st Sess., pp. 37–38):

"In the present condition of our Articles of War 'retainers to the camp' (i.e., officers' servants, newspaper correspondents, telegraph operators, etc.) and 'persons serving with the armies in the field' (i.e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United

Congress adopted the changes suggested by General Crowder by enacting Article 2(d) of the Articles of War of 1916, which provided:

> (d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.[33]

After full consideration by an eminent committee of experts and by Congress, Article 2(11) of the present Uniform Code—reflecting the fact that, while there is no war, there is a world situation far short of perfect "peace," requiring large military commitments across the world—re-promulgated the provision that civilians "accompanying or serving with" the armed forces overseas are subject to court-martial jurisdiction, and it further redefined the concept by adding the "employed by" classification.

States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906–7 in Cuba."

[33] The 1916 provision was reenacted in 1920, 41 Stat. 787.

d. *The Concept of "In the Field"*

Some of the various Articles of War limited jurisdiction over certain "connected" civilians to persons with the armies "in the field." [34] On the other hand, a number of other Articles dealing with court-martial jurisdiction over civilian employees serving with the armed forces do not use that phrase.[35] Beyond that, however, we submit that it would be a misconception to view the phrase "in the field," as it was used in the old Articles of War, as connoting "time of war" or as being limited to hostilities or a zone of actual operations. As Mr. Justice Harlan pointed out in his concurring opinion in *Covert* (354 U.S. at 71, note 8): "The essential element was thought to be, not so much

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[34] E.g., "All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field * * *" (British Articles of War of 1765, Sec. 14, Art. 23, Winthrop, 941).

"All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field * * *" (American Articles of War of 1775, Art. 32, 2 J. Cont. Cong. 111).

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field * * *" (American Articles of War of 1806, Art. 60) Act of April 10, 1806, 2 Stat. 359.

"All retainers to the camp, and all persons serving with the armies of the United States in the field * * *" (American Articles of War of 1874, Art. 63, R.S. § 1342).

[35] Eleven Articles of the British Articles of War of 1765, p. 32, *supra;* five Articles of the Articles of War of Massachusetts Bay of 1775, p. 34, *supra;* nine of the original 69 Articles of the American Articles of War of 1775, p. 34, *supra;* thirteen Articles of the American Articles of 1776, pp. 35–36, *supra;* and nine Articles of the Articles of War enacted by the Congress in 1806, p. 48, *supra.*

that there be war, in the technical sense, but rather that the forces and their retainers be 'in the field.' The latter concept, in turn, would seem to have extended to any area where the nature of the military position and the absence of civil authority made military control over the whole camp appropriate." Historically, "in the field" has included a force located where the civil power of the home government could not operate.

(*i*) As already noted, the basic concept of the present Article 2(11) of the Uniform Code of Military Justice is taken from Section XX, Art. II, of the British Articles of 1765. See *supra,* p. 33. This Article provided for trial by court-martial of crimes otherwise cognizable in the civil courts at Gibraltar, Minorca, Placentia and Annapolis Royal "where Our Forces now are, or in any other Place beyond the Seas, to which any of Our Troops are or may be hereafter commanded, *and where there is no Form of Our Civil Judicature in Force.*" Winthrop, 946. (Emphasis added.) The application of this Article was not limited to soldiers or officers or to time of war; it applied to all "persons" under the command of the Commanding Officer, in time of peace as well as war. This is borne out and explained by such writers as Samuel in his *Historical Account of the British Army, and of the Law Military* (published in London in 1816), explaining the necessity for the exercise of such jurisdiction. See *supra,* pp. 31–32.

(*ii*) The American experience during the seventy-five years following the adoption of the Constitution

confirms the view that sutlers and retainers were subject to military jurisdiction in the field in time of peace.

For instance, that court-martial jurisdiction might apply to civilians once they left the United States—*i.e.*, were "in the field"—was explicitly understood by the Congress in 1800. In the Rules and Regulations for the Government of the Navy adopted on April 23, 1800, the Congress included Article XXI:

> The crime of murder, when committed by any officer, seaman, or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court martial [2 Stat. 48].

This Article applied to civilian seamen,[36] who by virtue of the statute were left subject to civilian juris-

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[36] This is abundantly clear from the test which distinguishes between seamen "belonging to any public ship or vessel of the United States" on one hand, and a "person in the navy" or "persons belonging to the navy" on the other. See, *e.g.*, Articles XIII, XVI, XVII, XVIII, XXXII. Contemporary statutes referred to civilian personnel as "seamen" whether on merchant vessels (1 Stat. 729) or on other public vessels of the United States, such as revenue cutters (3 Stat. 127). The 1862 Article on the same point made it explicit that it applied to any "person belonging to any public ship or vessel of the United States" (12 Stat. 602). See Kensil Bell, "*Always Ready!*"—*The Story of the United States Coast Guard* (1943), for examples of public vessels manned by civilian seamen in 1800.

Since 1800, murders committed outside the United States by persons connected with that branch of the armed services which was most frequently outside the United States—the Navy—have been subject to trial by court-martial.

diction while within the territory of the United States, but when outside that territory—where United States civil courts would not be effective in punishing and deterring crime—were subject to a military trial.

The controlling concept of remoteness and absence of civil authority continued to be reflected in the materials. In 1814, the Attorney General, in expressing the opinion that punishment by court-martial of offenses committed on board vessels commissioned under letters-of-marque was contemplated only when such offenses happened out of the jurisdiction of the United States, said (1 Op. Atty. Gen. 177):

> The reason for the distinction may probably have been, that, unless the authority of the court-martial had been recognised for offences committed on board of these vessels when abroad, no punishment could have followed them—it being matter of great doubt how far the common code of the United States extends to the high seas; but for all such offences as may take place on board of them while they are within the jurisdictional limits of the United States, or their territories, the ordinary courts of law of the country are competent to afford redress. The jurisdiction of the military tribunals is not to be stretched by implication.

Records of courts-martial reveal that a number of civilians were tried prior to the Civil War in areas

where no hostilities appear to have been in progress."[37] It is evident that before the Civil War the concept of "in the field" was not at all limited to a theater of operations in wartime. At the very least, it covered an organized camp in a remote place where the civil law of the United States was not functioning or could be reached only with difficulty.

It was with this background of practical interpretation of the constitutional power that the Judge Advocate General of the Army gave this opinion in 1866:[38]

> WAR DEPARTMENT,
> BUREAU OF MILITARY JUSTICE,
> *November 15, 1866.*
>
> Respectfully returned to Bvt. Brig. Gen. Wm. M. Dunn, Asst. Judge Adv. Genl.
>
> It is held by this Bureau and has been the general usage of the service in times of peace, that a detachment of troops is an army "in the field" when on the march, or at a post remote from civil jurisdiction.
>
> It has been the custom and is held to be advisable, that civil employees, sutlers and camp followers when guilty of crimes known to the civil law, to turn the parties over to the

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[37] Fortress Monroe near Norfolk, Virginia (1825); Fort Washington, Maryland (1825); Fort Gibson, State unknown (1833); Fort Brooke, Florida (1838); Camp Scott, Utah Territory (1858); Fort Bridger, Utah Territory (1858); *The Ewing* (1849). These incidents are detailed at pp. 51–52 of the Government's Reply Brief on Rehearing in the *Covert* case.

[38] Opinion of the J.A.G. of the Army, Nov. 15, 1866, 23 Letters sent, 331 (National Archives).

courts of the vicinity in which the crimes were committed. For minor offenses against good orders and discipline, it has been customary to expel the parties from the Army: If, however, it is sought to punish civil employees in New Mexico, for crimes committed at a post where there are no civil courts before which they can be tried, it is held that they can be brought to trial before a General Court Martial, as they must be considered as serving with "an army in the field" and, therefore, within the provision of the 60th Article of War.

J. HOLT
Judge Advocate General

(*iii*) It is true that Winthrop thereafter expressed the view (p. 101) that the Article of War conferring jurisdiction on persons in the field "is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war." Winthrop assumed that "in the field" means "time of war" and then concluded that even those related Articles prescribing jurisdiction over connected civilians which do not contain the "in the field" phrase should be construed as being applicable only in time of war. What is ignored, however, is that the constitutional authority here involved is Clause 14, not the war power, and that the Congressional power under Clause 14 is "peace power" as much as "war power." The Constitution does not limit Congress to make regulations for the armed forces only when we are at war or to make regulations which would become operative only in time of war. And if a test of reasonableness is

applied to the exerise of jurisdiction over "civilians" under Clause 14, it would not automatically result in affirming military jurisdiction in time of war, while excluding it without more during periods when there are no declared hostilities. Absent such an inappropriate "automatic" test, the period of world tension during the present "cold war" with its concomitant world commitments of the United States surely provides ample justification for the application of courts-matrial power under Clause 14. See *infra*, p. 71 *ff*.

Moreover, a brief review of some of the conflicting opinions during the period when Winthrop wrote shows that there was no concensus of interpretation of the *constitutional* power supporting Winthrop's view. In 1872, the Attorney General issued an opinion, which Winthrop notes (at p. 101), that civilians serving with troops in Kansas, Colorado, New Mexico, and the Indian territory, at camps where it was necessary to build defensive earthworks and where persons had been killed by Indians, were "in the field." 14 Op. Atty. Gen. 22. The opinion rested primarily on the proposition that the words "in the field" imply military operations with a view to an enemy, and that an army was "in the field" when it was "engaged in offensive or defensive operations." But the opinion also noted, p. 24:

> Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of "an army in the field."

Subsequently, the Attorney General ruled that civil engineers employed by the Navy were subject to court-martial jurisdiction. 15 Op. Atty. Gen. 597. This was done without considering the question of "in the field" at all, but on the theory that such engineers were an integral part of the Navy. A brief opinion of the Attorney General on June 2, 1876, that a quartermaster's clerk was amenable to court-martial jurisdiction (unpublished opinions, Letterbook No. 4, page 32), again without reference to the "in the field" problem, evoked a reaction from the Judge Advocate General of the Army. His two opinions on this subject (available only in the National Archives and printed in Appendix B to the Reply Brief for Appellant and Petitioner on Rehearing in *Covert,* at p. 86) brought a reversal from the Attorney General in his opinions of May 15, 1878 (16 Op. Atty. Gen. 13) and of June 15, 1878 (16 Op. Atty. Gen. 48). Since the case at this stage involved the general question of the status of quartermaster clerks and superintendents of national cemeteries, there was no issue of anyone's being in the field and the Attorney General explicitly did not consider the scope of that concept (16 Op. Atty. Gen. at 15).

The consequence of this holding that clerks and employees (not even alleged to be in the field) were not subject to court-martial jurisdiction seems to have been an uncritical acceptance of the general notion that no civilian could be tried by court-martial in time of peace. But all such statements were made with

reference to cases *within the United States.*[39] And with the passing of the frontier, the extension of civil jurisdiction throughout the country, and the end of the Indian wars, it is probably true that—barring unusual circumstances such as invasion, internal chaos, or great emergency—it was no longer possible to be "in the field" in the United States (*i.e.*, in an area where civilian courts could not operate).[40]

(*iv*) Thus, the historical concept of "in the field" does not turn on peace or war but rather on the location of the military as a group apart in a defensive or offensive posture, or away from its own civil jurisdiction. Accordingly, the general historical rationale which justifies military jurisdiction over civilians with the forces in the field justifies the exercise of court-martial jurisdiction under Article 2(11) over

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[39] At the time of World War I, the federal courts upheld courts-martial in the case of a quartermaster employee at Camp Jackson, South Carolina (*Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645), and of another quartermaster employee on the Mexican border where the troops he was with were concerned with the intermittent raids of bandits (*Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.)). These cases were cited with approval by this Court, as reflecting a "well-established" power, in *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313, fn. 7. See also *infra*, pp. 63–66.

[40] Doubtless, the doctrines of *Ex parte Milligan*, 4 Wall. 2—holding that martial law could not extend to civilians "in nowise connected with the military" (4 Wall. at 121–122) where the civil courts are available—were carried over into the different field of military jurisdiction over civilian employees serving with the armed forces "in the field" so as to exclude from the "field", within this country, areas where the civil courts were open (at least in peacetime).

civilians who serve with or are employed by the forces in territory where the United States is not sovereign.[41] The basic reason why these forces have been sent overseas is that they may be placed in a military posture with respect to a possible or potential enemy. And, clearly, American civil law, in its territorial phase, cannot be present where these troops are. See p. 83 *ff*; infra. Both of these factors indicate that the forces subject to Article 2(11) are "in the field" in the sense in which that phrase was understood when the Constitution was adopted.

e. *The Decided Cases*

The exercise of Congressional power to provide court-martial jurisdiction over non-uniformed or "civilian" persons has been tested and upheld in the federal courts. These decisions demonstrate at the least that civilian employees of the armed forces, under certain circumstances, can be included within the term "land and Naval forces" of Article I, Section 8, Clause 14.

(*i*) In a series of early cases, "civilian" paymaster clerks were held to be "in military [or naval] service" for court-martial purposes. *In re Thomas,* No. 13,888, 23 Fed. Cas. 931 (N.D. Miss.); *United States* v. *Bogart,* No. 14,616, 24 Fed. Cas. 1184 (E.D.

[41] The Uniform Code of Military Justice uses the concept of "in the field"—in connection with court-martial jurisdiction over civilians—only for "time of war" (Article 2(10)). But the *constitutional* concept, as distinguished from its present statutory usage, is not so limited, and that concept supports the validity of Article 2(11). For, as we have pointed out, the latter provision covers troops stationed away from American civil jurisdiction.

N.Y.); *In re Bogart,* No. 1,596, 3 Fed. Cas. 796 (C.C. Calif.). This Court, when confronted with the same problem in *Ex Parte Reed,* 100 U.S. 13, scrutinized closely the connection between the Navy and paymasters' clerks and determined that for the purpose of military jurisdiction they would be considered "in the naval service." Likewise, in *Johnson* v. *Sayre,* 158 U.S. 109, where the lower court had issued a writ of habeas corpus on the ground that Sayre had been detained under sentence of infamous punishment, not in time of war or public danger, in violation of the Fifth Amendment, this Court, citing *Ex parte Reed, supra,* held that "He was * * * a person in the naval service of the United States, and subject to be tried and convicted, and to be sentenced to imprisonment, by a general court martial." 158 U.S. at 117.[42]

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[42] The opinions of the Court in the cases involving exercise of court-martial jurisdiction over paymasters' clerks indicate that the Court was not concerned with whether the person was a "civilian" or an enlisted man or an officer. The concern of the Court, and the issue upon which all the cases seem to turn, is the "connection" with the Navy and whether it was such that the clerk be "in" the naval service within the meaning of the applicable statute conferring court-martial jurisdiction. This is illustrated by the case of *Ex parte Van Vranken,* 47 Fed. 888, 890, where the District Court for the Eastern District of Virginia, in granting the writ of habeas corpus, specifically held: "That clerks of naval officers doing duty on land in time of peace, appointed from civil life for periods terminable at the will of such officers, and liable to return to civil life whenever such employment ceases, are civilians, and not members of the military establishment of the navy, seems to me to be too clear to admit of doubt". This Court reversed *sub nom. McGlensy* v. *Van Vranken,* 163 U.S. 694, "on authority of *Johnson* v. *Sayre*", but did not dispute the finding of "civilian" status.

(*ii*) In World War I and again in World War II, military court-martial jurisdiction over civilians both in the United States and overseas was upheld under the terms of Article 2(d) of the Articles of War of 1916, 39 Stat. 651.[43]

In *Hines* v. *Mikell,* 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645, the court held that a civilian auditor working with the army in time of war, at Camp Jackson in the United States, was amenable to court-martial jurisdiction. *Ex parte Gerlach,* 247 Fed. 616 (S.D.N.Y.), dealt with an "employee" of the United States Shipping Board, who, having served on a ship transporting troops to Europe, was returned to the United States aboard an army transport. He first volunteered to stand watch, but later refused to continue. The court (Judge Augustus N. Hand) held that Gerlach was a person accompanying and serving with the Army of the United States when he disobeyed the order, and that he was therefore subject to the jurisdiction of the military for court-martial purposes. Another case was *Ex parte Falls,* 251 Fed. 415 (D.N.J.), where the petitioner, an employee of the Army Transport Service, who had been assigned to duty aboard an army transport ship docked at Bush Terminal, Brooklyn, attempted to leave the ship and desert the service, just before the ship sailed for a

[43] "All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;".

foreign port. See also *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.)

In *Perlstein* v. *United States*, 151 F. 2d 167 (C.A. 3), dismissed as moot, *sub nom. Perlstein* v. *Hyatt*, 328 U.S. 822, a civilian employee of an Army contractor was stationed at a military base in East Africa occupied by American and British troops in World War II. He was subsequently ordered discharged by the United States Army officer in command and was to be sent back to the United States at the earliest opportunity. On the day of his departure he stole some jewelry and forged a receipt. After he had left the base, the theft was discovered and he was arrested on his arrival in Egypt and tried by court-martial. Military jurisdiction was upheld. A similar ruling was made in *In re DiBartolo*, 50 F. Supp. 929 (S.D.N.Y.), involving a mechanic employed by the Douglas Aircraft Company at its depot in Gura, Eritrea, in 1942; after he had been relieved of active duty because of illness he stole a diamond ring, and was tried and convicted by court-martial.

Other cases are: *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E.D. Va.) (a cook aboard a ship, under contract to the United States, carrying troops); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio) (a merchant seaman aboard a vessel, which was part of a convoy proceeding to Casablanca, committed an assault); *Grewe* v. *France*, 75 F. Supp. 433, (E.D. Wis.) (a seaman left his employment with the Merchant Marine in November 1945, at Antwerp, Belgium, and thereafter secured employment with the army in Germany; subsequently, charges were preferred against him,

and although he terminated his employment prior to trial by court-martial, he was held subject to military jurisdiction). After the Korean conflict, see *In re Varney's Petition,* 141 F. Supp. 190 (S.D. Calif.) (a civilian employee of the armed forces in Japan who was tried and convicted by court-martial of having imported prohibited articles into Japan).[44]

What emerges from these decisions is that, as this Court put it in *Duncan* v. *Kahanamoku,* 327 U.S. 304, 313, there is a "well-established power of the military to exercise jurisdiction over members of the armed forces [and] *those directly connected with such forces* * * *." (Emphasis added.)[45] That the itali-

[44] The United States Court of Military Appeals, which because of its experience in dealing with cases arising in the military services, may be deemed to have an unusually good grasp and understanding of the true military-civilian relationships on American bases in foreign countries, has repeatedly upheld the jurisdiction of courts-martial under the provisions of Article 2(11) of the Code. See *United States* v. *Marker,* 1 U.S.C.M.A. 393; *United States* v. *Weiman,* 3 U.S.C.M.A. 216; *United States* v. *Garcia,* 5 U.S.C.M.A. 88; *United States* v. *Robertson,* 5 U.S.C.M.A. 806; *United States* v. *Burney,* 6 U.S.C.M.A. 776. The United States Court of Military Appeals, of course, is "a court in every significant respect." *Shaw* v. *United States,* 209 F. 2d 811, at 813 (C.A.D.C.).

[45] In 1866, in the landmark case of *Ex parte Milligan,* 4 Wall. 2, 123, this Court stated it thus: "The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one *connected* with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts." (Emphasis added.)

cized portion of the quotation referred to persons *employed* by the armed forces is indicated by the fact that it is supported in the footnote by some of the same civilian-employee cases which we have cited, e.g., *Ex parte Gerlach, supra; Ex parte Falls, supra; Ex parte Jochen, supra;* and *Hines* v. *Mikell, supra.*

2. *Respondent's connection with the armed forces is sufficiently close to subject him to military jurisdiction*

The historical survey we have just concluded shows that if the individual is a civilian with a clear and direct relationship to the armed forces, so that he can properly be said to be a part of them, military jurisdiction must be upheld (at least if civil jurisdiction is absent). This Court has recognized this general jurisdictional test. In *Duncan* v. *Kahanamoku,* 327 U.S. 304, 313, the term "directly connected" was used to indicate the degree of civil-military relationship which would justify the exercise of military court jurisdiction; in *Toth* v. *Quarles,* 350 U.S. 11, 15, it was stated that court-martial power was not limited to those who were members of the armed forces but that it extended to those who were a "part of" such forces; and in *Covert,* Mr. Justice Black's opinion recognized that a person may legally be "in" the military although he was not inducted and did not wear a uniform. 354 U. S. at 22–23. We believe that the respondent and others like him clearly meet this general criterion.

The obvious reason for Congressional provision for court-martial jurisdiction over such civilians connected with the armed forces is the fact that the

troubled international situation has made it necessary for the United States to deploy its armed forces throughout the world, sometimes in remote and isolated areas. These forces include sizeable civilian contingents who accompany, live with, and form integral parts of the military force. Substantial numbers of highly trained specialists and technicians, whose skills are not readily available in the uniformed services and cannot be supplied by training those in uniform, are essential to the daily problems of maintenance and administration arising from the intricate and complex technology of modern warfare. The use of foreign nationals is impractical in many instances both because of obvious reasons of security and because of the unavailability in many areas of adequate numbers of trained foreign personnel who could work efficiently with our military personnel. For these reasons American civilians must, as a practical necessity, be employed to perform duties essential to the operation of the armed forces. The requirement of adequate civilian specialists becomes increasingly great in the light of modern atomic and missile warfare.

These civilian employees of the armed forces overseas stand in an intimate and direct relationship with the military forces—they are members of the military community. The civilian employee has a direct and vital connection with the armed forces and their military mission. He works side-by-side with members of the armed forces on projects of military significance; he is subject to the control of military su-

periors in the performance of his assigned work; and, not infrequently, military personnel are subject to his control and direction. He enjoys the privileges, provided by the military, of use of the commissary and base exchange, he is furnished military medical and dental care, membership in clubs on the military base, and other benefits generally associated with membership in the armed forces. In addition to being transported overseas at government expense, these civilians are supplied passports which identify them as employees of the armed forces. They are admitted to the country in which they live without a visa because the particular armed force vouches for their behavior. They use military payment certificates, the armed forces' medium of exchange, and they have the benefits of the special armed services postal facilities, which are not available to Americans traveling abroad as tourists or on business. The benefits of this postal system include reduced overseas postal rates, special custom privileges, and availability of money order and other services of the Post Office Department. They enjoy the same tax exemptions, customs benefits, and border-crossing privileges as the uniformed members of the services. Both are permitted to import automobiles without tax in many countries where importation is strictly forbidden to others.

Schools are maintained at government expense for all children of the military community without regard to whether their parents are soldiers or civilians. Churches, theaters, clubs, tours, and sporting and cultural events are shared by civilian and military

members of the military communities overseas. Members of the civilian contingent are normally housed by the military. They are furnished heat, light, fuel, water, telephone and other services. They ride in military transportation, and their food, clothing and other necessities are available from sources maintained by the armed services. Special banking facilities, provided for the services, are utilized by these civilians, who also share with the military the protection of the military police. In many areas the forces make gasoline, oil, and parts available for private automobiles, and maintain service stations and garages. Also, in many areas they issue automobile license plates and drivers' licenses to military and civilian members of the community, and supervise the issuance and administration of automobile insurance for them.

These, as well as other factors, closely identify these civilians overseas with the armed forces. In every essential of their daily living their activities are interwoven with those of the military. Because they are so closely identified with the armed forces, the local populace in the various foreign areas look upon and identify these civilians only as members of the American military community. In most foreign countries, military personnel wear civilian clothes off the base. To the local population civilians and military are indistinguishable.

In sum, individuals of respondent's class meet *each* of the following factors showing closeness of "connection" with the military:

1. The duties of the person—the similarity or dissimilarity of those duties to the duties of uniformed personnel;

2. The place of performance of those duties—whether these duties are performed side-by-side with uniformed personnel, or whether they are performed in a separate and distinct locale;

3. The hierarchy of command—whether the person is subject to the orders and instructions of military personnel with reference to his work and duties;

4. The military privileges to which the person may be entitled—whether he is entitled to use the commissary, service club, and other military facilities normally reserved for uniformed personnel;

5. The absence of any local civilian status—whether the person is in any substantial relationship to the local civilian authorities, judicial or executive, or whether he is an integral part of the American military community, and whether there is a military responsibility for his conduct.

By the same tokens, under all the historical tests of military jurisdiction over civilian components, Article 2(11) is fully valid as applied to respondent's case. He is precisely like the "sutlers", the "retainers", the "drivers", the "wagon masters", the "gunners", the "commissaries", the "quartermasters", the "forage masters", the "paymasters", who have been treated as liable to court-martial—even though "no inlisted men". See *supra*, p. 29 *ff*. His situation at an Air Force Base in Morocco is "in the

field"—in the historical sense—especially since at that place "there is no Form of Our Civil Judicature in Force". See *supra,* pp. 33, 52 *ff*. By the traditional standards he is part of, and "in", our "land and naval Forces" for the purposes of Article I, Section 8, Clause 14, of the Constitution.

B. COURT-MARTIAL JURISDICTION OVER CIVILIAN EMPLOYEES AND DEPENDENTS ACCOMPANYING OR SERVING WITH THE ARMED FORCES OVERSEAS IS A PRACTICAL NECESSITY

1. *There are large numbers of civilians who must be abroad for the defense of the country*

Today, almost half-a-million American civilians are accompanying or serving with the military in dozens of countries on many bases around the globe. As of March 31, 1959, there were 25,585 American civilian employees and 455,086 American dependents accompanying the armed forces abroad. See the Appendix, *infra,* pp. 110–111. Most of the employees are in positions in which they cannot easily be replaced by men in uniform. In particular, there are several thousand contractor employees and technical representatives who are highly skilled technicians and advisers whose services are indispensable to a military force which must increasingly rely on ever-changing and ever-more-complicated scientific equipment. To suggest that the most practical solution is for the United States to send these men home is to argue that the country is constitutionally precluded from using the skilled talents of those civilians who are willing to come overseas to work with the military and willing to subject themselves to its jurisdiction.

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As for dependents, it is clear that to forbid families from accompanying servicemen overseas would seriously affect morale, hamper recruitment, and thereby weaken the national defense. The situation today is not essentially different from that which faced Washington when he decided that he had to keep wives in the camp "or by driving them from the Army risk the loss of a number of Men, who very probably would have followed their Wives." "In a word, I was obliged to give Provisions to the extra Women in these Regiments, or loose by Desertion * * * some of the oldest and best Soldiers in the Service." (*Writings of Washington,* Vol. 26, pp. 78–79.) There is no question but that in the interests of self-defense in today's world the United States must be prepared to have some 455,000 dependents overseas living with their servicemen kin, in housing and using provisions and services made available by the United States. In short, there is no real alternative to the maintenance of large numbers of American civilians overseas accompanying, working with, and living with the military forces.

2. *Both employees and dependents create problems of discipline requiring the exercise of criminal jurisdiction*

a. *The magnitude of the problem*

As we have noted, the number of civilians accompanying the military abroad is now about 480,000. In contrast, the number of Americans in diplomatic and comparable missions abroad (together with their de-

pendents) number considerably less than 20,000.[46] The contrast between the number of military dependents and employees among whom order must be maintained and the small number of people connected with our diplomatic posts is brought out even more clearly by considering particular countries. In the United Kingdom, there were, at the end of 1956, over 46,000 military dependents, as contrasted with some 480[47] Americans connected with the diplomatic missions; in Japan, there were over 68,000 military dependents, as contrasted with some 758[48] Americans connected with the United States missions. From the point of view of numbers alone, it is clear that the problem of administering justice within American military communities numbering in the tens of thousands is not at all on a par with the problem of possible criminal acts committed by American diplomats abroad.

b. *The number of offenses committed*

There is no question but that there is a substantial criminal problem among the dependents and employees overseas. It does not reach the urban crime rate in the United States, but in groups as large as those here involved there exists a problem which cannot be ignored. The military dependents as a group are unlike the foreign service, not only in their size

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[46] The figures as of December 31, 1956, are given in our Reply Brief for Appellant and Petitioner on Rehearing in the *Covert* case, at pp. 64–65.

[47] State Department, 164; International Cooperation Administration, 9; United States Information Agency, 19; plus estimated dependents, 288.

[48] State Department, 215; International Cooperation Administration, 25; United States Information Agency, 63; plus estimated dependents, 455.

but in their make-up. The foreign service is carefully selected and consists in large part of those making that service a career. One serious misstep—by the foreign service officer or his family—and the career may well be ruined. On the other hand, dependents accompanying the forces overseas have obviously had no prior selection (except by the individual members of the forces). The generally accepted standards of conduct among the military community are not as strict and the consequences of "getting caught" are not as serious to the dependent's or to the serviceman's future. Civilian employees are likewise not as carefully selected as members of the foreign service.

The Department of Defense has reported that between December 1, 1954, and November 30, 1958, there were 5,026 cases involving civilian employees and dependents which were subject to the primary jurisdiction of the foreign courts of the host nation. Such jurisdiction was waived to the United States in 4,051 cases, or 80%. The following table provides a more detailed breakdown of the cases subject to foreign primary jurisdiction:[49]

[49] These figures do not include offenses committed by American civilians abroad who were subject to our primary or exclusive jurisdiction (for which statistics are not available). For example, in Germany, the United States has exercised exclusive jurisdiction as to all offenses of the civilian contingent, except only for capital offenses committed by dependents.

Type of offense (period 1 Dec. '54 to 30 Nov. '58)	Subject to foreign jurisdiction		Waiver of foreign jurisdiction obtained	
	Employees	Dependents	Employees	Dependents
Murder	1	2	0	1
Rape	3	1	3	1
Manslaughter (including negligent homicide)	32	16	10	3
Arson	0	6	0	5
Robbery, larceny and related offenses	7	36	5	25
Aggravated assault	8	8	4	4
Simple assault	50	21	41	16
Offenses against economic control laws	231	54	36	41
Traffic offenses incl. drunken and reckless driv. and fleeing scene of accident	2,566	1,791	2,187	1,587
Disorderly conduct, drunkenness, breach of peace, etc	28	41	19	34
Other	36	88	14	15
Totals	2,962	2,064	2,319	1,732
Combined Totals	5,026		4,051	

Most of these offenses were handled administratively, but, as indicated by the table, there remains a residue of offenses which could appropriately be handled only by a criminal trial. As pointed out in our Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert,* at pp. 30–31, in the fiscal years 1950–1956, there were 181 civilians tried by general court-martial by the Army, and 2,273 by special or summary court-martial (by the Army). See, also, *infra,* p. 79 *ff.*

c. *The special status of the civilian contingent as an integral part of the armed forces overseas*

These military civilians overseas are in a unique status. They are not tourists or casual visitors who should expect to be amenable to the jurisdiction and the legal systems of the country in which they travel. We have described their integration into the armed

services. *Supra,* pp. 66–71.[50] Not only the United States—through its legislative and executive branches—but the foreign governments have recognized the special status of these persons by making special provisions for them in the treaties governing the status of our military forces. For the most part, the American civilian contingent is satellited in or near military bases in American "communities" which are regulated by American authorities and policed by American military police.[51] American civilian personnel accompanying the armed forces overseas find themselves in strange surroundings, unfamiliar with local laws and customs, generally unfamiliar with the language; and, because they live in American communities in these countries for periods of years, their lives are much more closely oriented to the armed forces and its facilities than is the case within the United States. The restrictions placed upon them and

[50] The situation of civilian components of a military force is different from that of many other United States civilians in foreign countries, not only because they live more in a United States enclave than do the others and their presence is less casual, but because less volition is involved in their coming to the foreign country. A United States citizen who chooses to tour or to live in a foreign country has chosen to put himself under foreign law. A United States soldier is in a foreign country because the United States has sent him there, and his family is there because he has been sent there. And while perhaps more volition is involved in the case of civilian employees of the armed services, they too are there because of the needs and calls of the United States. In many cases they belong to the career civil service and are required to serve a tour abroad which, because of career considerations, they can ill afford to refuse.

[51] See, *e.g.*, par. 10, Article VII, NATO Status of Forces Agreement, T.I.A.S. 2846.

the rights, privileges, and protections which the American authorities are permitted to extend to them in the foreign countries depend for their existence on agreements made with the foreign governments. Generally, the exercise of United States military authority and the use of United States military facilities are permitted in order to make the American employees and dependents independent of the local economy. It is primarily the status of the individual as an employee or dependent of a member of the forces that determines his duties, rights, privileges, and protection.

The NATO Status of Forces Agreement and similar treaties take into account the unique position which American civilian employees and dependents occupy in the foreign country and place responsibilities for this group upon the American military authorities.[52]

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[52] Article II, NATO Status of Forces Agreement, provides:

"It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measure to that end."

Par. 5(a), Article VII, provides:

"The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions."

Par. 3, Article XIII, provides:

"The authorities of a force shall render all assistance within their power to ensure the payment of duties, taxes and penalties payable by members of the force or civilian component or their dependents."

The military are responsible for the protection and behavior of the American civilian employees and dependents, as well as for American personnel in uniform. In the United States, an offense of a civilian employee or dependent is dealt with by state authorities as they would deal with the case of any civilian. Overseas it is different. American military police have been permitted to perform their functions with respect to American personnel wherever they may be (subject to limitations imposed by American law and by arrangements with the foreign country), and American military tribunals have been permitted to take cognizance of all sorts of offenses committed by American civilians on foreign soil.

For these reasons, the military authorities must play a major role in the relations of these civilians with the host country; this is manifested (in part) by the willingness of foreign nations to relinquish to courts-martial jurisdiction in cases such as that with which we are here concerned. The military have the responsibility of operating the military community in such a way as to give the best possible impression of the United States to the people in foreign areas. Also, in the final analysis it is the United States military who have the responsibility, at an overseas base, of maintaining the armed forces at that base—with all their technical and logistical support—in a state of combat readiness to meet any eventuality. See, further, *infra*, p. 79 *ff*.

d. *The need for court-martial jurisdiction*

In connection with the reargument of the *Covert* case, the Department of Defense solicited from overseas commanders their views concerning the necessity for court-martial jurisdiction. Without exception, these commanders stated that discipline would be disrupted, morale impaired, and ability to perform the assigned mission reduced if jurisdiction under Article 2(11) were lost. Some of the replies were printed as Appendix A to the Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert*.

The basic theme running through all the replies was that responsibility cannot be divorced from effective power to control. First, there is the military mission itself, and the need to protect it. Then, the continued willingness of foreign governments to allow United States troops to remain within their territory may depend upon the ability of the military commander to maintain law and order. To hold that the United States did not have the constitutional power to give its military commanders authority over military dependents and employees overseas would make some foreign governments less willing to accept United States contingents in their territory and to this extent would weaken the military defense of the United States and the free world. To the local population civilians and military are indistinguishable. As a corollary, the local populace naturally—and rightly—expects the military commander to supervise and control this civilian contingent. Without the existence of deterrent

power with respect to these civilians, the commanders' efforts to maintain the smooth community relationships necessary to successful fulfillment of his mission in a foreign land would be seriously impaired. Finally, the commanders have the underlying responsibilities of providing for the security, health, welfare, schooling, religious activities, and physical safety of all of the members of the military community. To discharge these responsibilities the commander must have some control over the activities of his charges. He must be able to prevent and deter activities which would jeopardize the security and effectiveness of his command and he must be able to protect his personnel from one another.

In large part, commanders attempt to meet these heavy responsibilities by the promulgation of orders, regulations, and other directives applicable to the personnel of their commands, and covering various phases of the activities of military and civilian personnel. But if the commander has no jurisdiction over the civilians, he has no effective means of enforcing his orders as to them. A man or woman in civilian clothes could violate the orders with impunity, whereas a man or woman in uniform could expect to be punished for a similar violation. For example, if there is no power to enforce security regulations as to the civilian contingent, the commander's directives become almost meaningless as to them, and the very security of the command might be impaired or undermined.

The fact is that all kinds of violations by the civilian part of our military contingent—whether stealing or the introduction of narcotics, or black-marketeering, or neglect of safety regulations—necessarily affect the military portion of the contingent and the group as a whole and reflect on the status of our contingent as visitors in a foreign land. It would be unfair to permit a civilian to violate the commander's directives concerning security, black-market activities, illegal money conversions, postal operations, banking, ownership and operation of automobiles, entering off-limits areas, etc., with impunity, while the soldier working at the next desk or living across the hall is tried by court-martial for participating with the civilian in the very same offense. Such a situation is contrary to one of the cardinal principles of maintaining order in a military community (or any other community), *i.e.*, the fair, just, and equal treatment of all its members. Illustrative of this problem is the present case with its anomalous situation of two out of three co-conspirators standing convicted and being punished juxtaposed to the third conspirator—respondent Guagliardo—who may go unpunished despite the fact that he was equally guilty of the acts charged and equally a part of the military command. All three defendants in this case were members of the same military installation; they had the same commanding officer; they had practically identical rights and privileges at the installation; they committed the same offense.

In addition to the factor of inequality, it is obvious that administrative remedies are not adequate to deal with felonious offenses or the more serious misdemeanors. It is a basic premise of our law that the power to impose fines and imprisonment is the most effective governmental means of deterring infractions. Moreover, to deprive an employee of commissary privileges might either be ineffective as punishment, as in Paris where other supplies are available, or out of the question, as on a Greenland air base where no other food is available except that provided by the United States. Sending an employee back to the United States deprives the government of the services of a man who would not be there unless his services were required, and may in many cases be no deterrent at all. Sending a dependent back to the United States enforces that separation which the program of having dependents overseas is designed to avoid, and may also, in many instances, have no deterrent effect. In either case, the "remedy" is costly and injurious to the accomplishment of the military mission.

It may properly be assumed, we suggest, that cases which can adequately be handled by administrative disposition are now being handled in that way, since this is easier than conducting a court-martial. The fact that in many cases the commanding officer has found that a court-martial was required to consider and, if need be, punish civilians under his command demonstrates that those responsible for the success of our military missions overseas cannot maintain effective control without criminal jurisdiction.

C. THERE ARE NO ACCEPTABLE ALTERNATIVES TO THE EXERCISE OF COURT-MARTIAL JURISDICTION

Four possible alternatives to court-martial jurisdiction exist: (1) trial in foreign courts; (2) trial in Article III courts sitting in the United States; (3) trial in Article III or legislative courts sitting in foreign countries; and (4) elimination of American civilian employees from the forces overseas, and elimination of facilities for moving and maintaining dependents overseas. None of these alternatives is adequate; at the least, Congress could reasonably decide that none of the alternatives should be adopted, but that present-day conditions require that court-martial jurisdiction be maintained over the civilian contingent of the armed forces abroad. In their opinions in *Covert,* Justices Frankfurter and Harlan acknowledged that it was a question of judgment—akin to an issue of due process—as to whether a trial by court-martial was permissible, in the light of the "particular local setting, the practical necessities, and the possible alternatives" and in view of the demands of the Constitution as a whole. 354 U.S. at 43–44, 64, 74–75.

1. *Trial in Foreign Courts*

A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. *Schooner Exchange* v. *McFaddon,* 7 Cranch 116, 136; *Wilson* v. *Girard,* 354 U.S. 524. At the present time, if the offense has been made an extraterritorial one under the laws of the United States, jurisdiction may be exercised by the

United States only if the offender voluntarily returns to the United States or if the United States is successful in securing his extradition. As our present extradition treaties do not appear to cover offenses committed in foreign countries,[53] any alternative to the exercise of court-martial jurisdiction must be considered in the light of what is or may be agreed to by the foreign country, and secondly what is, or may be, acceptable to the United States.

a. It appears unlikely that a foreign government would object to the principle of trying American civilian employees and dependents in its courts for violations of its laws. In fact, foreign courts now try civilian employees and dependents in many cases. However, if the offense involves only American personnel or property, it cannot be expected in every case that the jurisdiction of the foreign tribunals will be invoked with the same vigor as if foreign nationals or property were involved.

As the United States Court of Military Appeals stated in *United States* v. *Burney,* 6 U.S.C.M.A. 776, 800:

> Going from this case to areas far more damaging to the combat readiness of an overseas

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[53] The treaties normally apply when the crime is "committed within the jurisdiction of one of the contracting Parties," and the offender "shall seek an asylum or be found within the territories of the other." Treaty with France for the Extradition of Criminals, Jan. 6, 1909, Art. I, 37 Stat. 1527, T.S. 561. See also Extradition Treaty with Great Britain, Dec. 22, 1931, Art. 1, 47 Stat. 2122, T.S. 489. Moreover, the treaties generally cover only major common-law types of crimes recognized by both nations. 4 Hackworth, *Digest of International Law,* 41–45.

command, it is readily ascertainable that black market transactions, trafficking in habit-forming drugs, unlawful currency circulation, promotion of illicit sex relations, and a myriad of other crimes which may be perpetrated by persons closely connected with one of the services, could have a direct and forceful impact on the efficiency and discipline of the command. One need only view the volume of business transacted by military courts involving, for instance, the sale and use of narcotics in the Far East, to be shocked into a realization of the truth of the previous statement. If the Services have no power within their own system to punish that type of offender, then indeed overseas crime between civilians and military personnel will flourish and that amongst civilians will thrive unabated and untouched. A few civilians plying an unlawful trade in military communities can, without fail, impair the discipline and combat readiness of a unit. At best, the detection and prosecution of crime is a difficult and time-consuming business, and *we have grave doubts that, in faraway lands, the foreign governments will help the cause of a military commander by investigating the seller or user of habit-forming drugs, or assist him in deterring American civilians from stealing from their compatriots, or their Government, or from misusing its property.* [Emphasis added.] [44]

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[44] See also, the letter to The Adjutant General, Department of the Army, of November 29, 1956, from the Commanding General, Advance Section (7965), USAREUR Communications Zone (Brig. Gen. W. R. Woodward):

* * * The French have little interest in trying cases not subject to their primary jurisdiction, and there is much diffi-

That the foreign governments do not now exhibit special concern with prosecuting American civilian employees and dependents is attested by the high percentage of cases—about 80%—in which the foreign governments have chosen to waive their jurisdiction. See *supra,* pp. 74–75. To deprive the Unite States of the power to try these offenders by court-m rtial will, as pointed out below, prevent the United States, as a practical matter, from exercising any criminal jurisdiction in most cases. We have already discussed the need for criminal penalties (*supra,* pp. 79–82). And the absence of criminal penalties would assume particularly great significance for the multitude of police-type regulations—such as traffic, health, and economic

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culty for them in doing so. Where one American has injured another, the witnesses, the background, and the relevant social customs are equally foreign to the French court. Imprisonment of the guilty party costs French money. Investigation of the case costs French money. It is doubtful whether the French would be interested in going to the trouble or expense of prosecution and conviction, unless French nationals or property were involved. * * * [Appendix A, p. 98 at 103, to Supplemental Brief For Appellant and Petitioner on Rehearing in *Reid* v. *Covert* and *Kinsella* v. *Krueger*, Nos. 701 and 713. O.T. 1955].

Likewise, in a letter dated November 29, 1956, to the Judge Advocate General, the Commander of the Naval Forces, Far East, explained:

> Our experience in Japan indicates that the Japanese for political reasons are much more interested in the right to exercise criminal jurisdiction than in its actual exercise. In only a small percentage of cases do they now exercise jurisdiction when they have the primary right. There is serious doubt that they could be prevailed upon to accept jurisdiction of cases where only American personnel and American property were involved. * * *. [*Id.*, p. 115 at 117].

control measures—the violation of which carries a relatively small degree of moral taint which otherwise might act as a deterrent.

b. Moreover, in several important areas the foreign criminal sanctions will be totally inadequate to cope with the criminal misconduct of Americans abroad. Foreign courts cannot exercise jurisdiction over offenses peculiarly punishable by the law of the United States. In this category are many violations of regulations governing a particular overseas area which are made punishable as violations of Article 92 of the Uniform Code of Military Justice, 10 U.S.C. 892. Under this Article are enforced many important regulations pertaining to the security of the United States and of our bases abroad, and significantly for the Far East in particular, those relating to the traffic in drugs. Crimes involving graft and bribery, frauds against the United States, and other serious offenses against the United States are made punishable by the Uniform Code of Military Justice. While it may perhaps be possible to punish the most serious of these acts by trial in federal courts in the United States (see *infra,* p. 90 *ff.*), resort to foreign courts will usually be impossible.

c. From the viewpoint of the American contingent generally (as distinguished from a particular convicted defendant who hopes to gain an immediate advantage from a lack of jurisdiction), the right to be tried under United States law has substantial advantages. It is not a reflection on the standards of other countries to recognize the Congressional judgment that members of United States military components should, so far as possible, be tried under United States mili-

tary law rather than the law of a foreign state where our forces happen to be stationed because of United States military commitments.[55] To a certain extent, judicial procedures provided by some of the foreign governments would fail to accord to an accused rights which we in the United States have considered important in our judicial proceedings. In a number of countries, a trial may be conducted without the presence of the defendant. The right against self-incrimination, the right to cross-examine, and other safeguards would not be available in the form known here to Americans who must stand trial in some of the countries where they are stationed. Unfamiliarity with the forms of procedure in itself results in hardship. And leaving out all other points of difference, it is to be remembered that the mere fact that proceedings would in most countries be conducted in a foreign language in itself raises problems for any defendant.

Problems arise also for the defendant with respect to a sentence imposed by a foreign court. The conditions of imprisonment vary and cannot be controlled by the United States. Incarceration in a for-

[55] The sentiments of the United States public, as reflected in Congressional policy, seem to be that trial under United States law is the preferred alternative; this sentiment was reflected in the advice and consent to the ratification of the NATO Status of Forces Agreement (4 U.S. Treaties, 1792, 1828) and in supplementary agreements with other countries. It has been the policy of this Government, in a large majority of the instances where the problem has arisen, to seek waivers from foreign governments of their primary right to exercise jurisdiction over our nationals in uniform or accompanying our armed forces as civilians. See *supra*, pp. 74–75.

eign jail is more onerous because of differences in language and nationality. The prisoner will usually be less accessible to family and visitors, and rehabilitative efforts, clemency, and parole procedures may be expected to vary considerably from those familiar to us. Parole may be denied by the foreign authorities because of their inability to supervise the parolee after his return to the United States.

All of these problems are, of course, aggravated if trials must be had in countries with judicial systems sharply alien to the fundamental traditions of the United States. Indeed, even with respect to those countries which are members of NATO, the United States insisted on specific procedural safeguards to insure a fair trial of our citizens abroad.[56]

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[56] North Atlantic Treaty, Status of Forces Agreement, Art. VII, Sec. 9, T.I.A.S. 2846:

"9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

"(a) to a prompt and speedy trial:

"(b) to be informed, in advance of trial, of the specific charge or charges made against him;

"(c) to be confronted with the witnesses against him;

"(d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;

"(e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

"(f) if he considers it necessary, to have the services of a competent interpreter; and

"(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial."

An identical provision is found in our Status of Forces Agreement with Japan. T.I.A.S. 2887.

2. *Trial in Article III Courts Sitting in the United States*

a. Even if the offense is one over which the United States has exclusive jurisdiction because it is not punishable by the law of the foreign country, the present NATO Status of Forces and similar Agreements permit the exercise of criminal jurisdiction within the receiving State only by the military authorities of the sending State to the extent that jurisdiction is conferred on them by their law. See Art. VII, T.I.A.S. 2846 at 6. A decision that civilian employees and dependents overseas are not subject to military jurisdiction would mean that there is no present authority in the treaties for the arrest or detention for removal to the United States of civilian employees or dependents who are accused of a crime against the United States. To provide for trial in the United States, special agreements with foreign countries would have to be negotiated. Our present extradition treaties appear not to cover this situation (see footnote 53, *supra*), as they generally apply only where the offense is committed within the the territory of the State asking extradition, and also usually apply only to the major common-law crimes recognized by both countries. In the absence of a voluntary return of an offender, therefore, the United States could effectively assert jurisdiction only to the extent that new agreements could be obtained, or in cases in which the foreign country expelled the individual and returned him involuntarily to the United States.

Negotiations for new agreements to provide for extradition of offenders would undoubtedly be difficult, particularly if the offenses for which extradition is sought are cognizable under the laws of the host country.

As pointed out in Snee and Pye, *Status of Forces Agreement: Criminal Jurisdiction* (1957) (p. 44):

> In the final analysis, however, the suggestion that dependents be tried by American civilian courts for crimes committed in other NATO countries overlooks the fact that the sole ground for a claim of jurisdiction by the sending State over its dependents is their intimate relationship to the armed force or civilian component of whose members they are dependents. If that relationship is so tenuous or non-existent that it will not afford constitutional sanction for the exercise of jurisdiction by a military court, there would seem to be no basis for the sending State to claim, nor for the receiving State to grant, the right to exercise criminal jurisdiction over dependents for conduct which also constitutes an offense against the law of the receiving State, any more than in the case of ordinary tourists.

As appears from the correspondence between the United States and the United Kingdom during the pre-NATO period (which was set forth in the Appendix to the government's original brief in *Covert*, pp. 78–84), the consent by the United Kingdom to our exercise of jurisdiction even over members of our armed forces for trial in that country represented a "very considerable departure * * * from the tra-

ditional system and practice." The traditional British view is that members of visiting forces are completely subject to the jurisdiction of the local courts. See Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction,* 27 British Year Book of International Law 186. The United States, for itself, insisted in Section 2 of the Service Courts of Friendly Foreign Forces Act (22 U.S.C. 702) that trial by service courts of foreign countries take place "within the United States." The same section provides that where the offense is against a member of the civilian population the trial shall not only be within the United States but "within a reasonable distance from the place where the offense is alleged to have been committed." This position heretofore taken by the United States and other countries provides no support for the conclusion that any government would relinquish jurisdiction to another state for trial abroad for conduct which is a crime under its own law and which was committed in its territory.

b. Even if the consent of the foreign governments could be obtained, there are numerous difficulties inherent in the exercise of jurisdiction in the United States which would limit its use for all but the most serious offenses. The very remoteness of the trial would lessen the chance of prosecution for a large number of crimes for which criminal sanctions are required.

The offenses committed by military employees and dependents abroad can be broken down into four categories. *First,* there is a vast number of minor

traffic offenses, and other minor infractions of rules such as disturbing the peace. Most of these are dealt with administratively, some by summary court-martial. It may surely be assumed that those cases would not be taken to the United States for trial.

The *second* category includes the serious automobile violations, such as drunken and reckless driving, and comparable lesser crimes. Experience in all commands in this country and abroad demonstrates that such offenses require the criminal sanction of substantial fines and jail sentences which may or may not be suspended. Numerically, these are the most common offenses by civilians which have been handled by court-martial jurisdiction overseas. Should punishment for these offenses require transferring the accused and witnesses to the United States for trial, it may be a foregone conclusion that the offenses would go unpunished. To inflict, say, a fine of $250 and a five-day sentence, few commanding officers would recommend that the government spend perhaps thousands of dollars for transportation and take two or more men away from their work for at least a week. Aside from the expense, the foreign witnesses may well not be available to come here, and they cannot be compelled to do so, in the absence of some special arrangement with the host country. The crime would go unpunished and, in a group of some 455,000, it may again be assumed that the consequence of lack of punishment would be an increase in crime.

The *third* category is comprised of the common felonies including larceny, assault, converting gov-

ernment property, etc., and also includes the economic crimes of black market activity and smuggling on an organized basis. Here, criminal penalties are obviously called for, but once again it is doubtful whether there would be sufficient sureness of a trial in the United States to act as an adequate deterrent. Too often, the difficulties of obtaining permission from the foreign government, arranging for witnesses,[57] and disruption of local operations would appear to outweigh the necessity of punishing the particular crime.

The *fourth* category, in which there are few cases, is that of the truly major crimes. For these, and for some of the felonies in the third category, attempt would probably be made to arrange for trial in the United States. There would still be the problem of bringing witnesses to the United States—a problem which in the past has proved serious for both the government and defendants. For the government, two of the most common type of witnesses whose presence is required are co-conspirators and local police officials. In the case of organized smuggling or black-market activities, the co-conspirators are usually foreign citizens who have violated their own laws. Experience shows that they are unwilling to come to the United States to testify, even should their government be willing to let them out of the jurisdiction, which it frequently is not. Where local

[57] In this connection, it must be remembered that the defendant would have the burden of securing and transporting witnesses, including non-Americans, unless Congress made some special provision.

police and other officials are witnesses, there have in the past been problems in arranging to have them come to the United States. Where other citizens of the foreign country are the witnesses, they frequently decline to come so that they will not become involved. The local government, which would lend its process to make them available within its country, will not, and usually cannot, require them to go to the United States to testify. Depositions for the prosecution in criminal cases might well be barred by the Sixth Amendment. See *Dowdell* v. *United States*, 221 U.S. 325, 330.

In all types of cases tried in the United States, there would be the recurring problems of (i) lack of prompt and local punishment, (ii) the disruption of discipline and morale by having one system of justice for the military and another for the civilian contingent, (iii) the prosecution of joint offenses (as in the present case) committed by members of both contingents, and (iv) the delays and difficulties which are always incident to a distant trial far from the true venue of the crime.

3. *Trial in Article III Courts or in Legislative Courts Sitting in Foreign Countries*

a. Any request to a foreign country to permit the United States to establish a system of civilian courts to sit in its country and try American civilians who accompany the armed forces is bound to imply that a fair trial is not available in that country. There is an historical tradition in many countries, including the United States, that the country of a visiting *mili-*

tary force may exercise jurisdiction over its troops under its own law. See *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 139; *Tucker* v. *Alexandroff*, 183 U.S. 424, 433. As previously indicated (*supra*, p. 77 *ff.*), it was a recognition by foreign countries that civilian employees and dependents are an integral part of the visiting force that was the basis for asking military jurisdiction over them in the Status of Forces and related Agreements. It was also this recognition that led the Government of the United Kingdom to pass a statute [58] similar to Article 2(11) of the Uniform Code of Military Justice.

The concept of a civilian judicial system, divorced from the military authority, sitting in a foreign country, has as an historical precedent only the extraterritorial courts which existed for many years in countries then considered not to have an enlightened judicial system. History tells of the feelings aroused by the presence of such extraterritorial courts which these countries regarded as an infringement upon their sovereignty. Some foreign nations in which our troops are now stationed have insisted on removal of extraterritorial courts from their countries,[59] and it would be unrealistic to suppose that they would consent to their reinstatement. Even the debates in the British House of Commons before passage of the Vis-

[58] Section 209, Army Act, 1955, 3 & 4 Eliz. 2, c. 18.

[59] *E.g.*, Japan succeeded in 1899 in releasing itself from the limitations imposed on its sovereignty by the exemption of aliens from its local jurisdiction. Fenwick, *International Law*, 3d ed., 273. The United States acceded to a treaty with Turkey in 1931 which recognized the abolition of extraterritorial courts. 28 Am. Jour. Int'l Law (Supp.) 129–130 (1934).

iting Forces Act implementing the Status of Forces Agreement revealed strong opposition to recognition of any American jurisdiction.[60] See also *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas,* 71 Harv. L. Rev. 712, 715.

Whereas many countries historically have been willing to cede a portion of their civil jurisdiction to their own military tribunals, and for similar reasons to the military tribunals of allied forces, there is no reason to expect that they would, in this day and age, surrender jurisdiction to a foreign civil tribunal sitting within their territory.

Since the present case arose in Morocco, it is pertinent to note that in June 1956 the United States relinquished consular jurisdiction in that country by Joint Resolution of Congress, S.J. Res. 165, 70 Stat. 773, see Senate Report No. 2274, 84th Cong., 2d Sess., June 19, 1956. At the time the Joint Resolution was under consideration by the Congress, the Secretary of State in his recommendation to the Senate Committee on Foreign Affairs stated pointedly that the relinquishment of this jurisdiction appeared as "the only course in keeping with the high traditions of United States policy and with our sympathies for the aspirations of peoples moving along the road toward self-government" (Senate Report No. 2274, *supra,* p. 2). The remarks made to the Senate by Senator Smith of New Jersey, concurring with the views of Senator George, Chairman of the Foreign Re-

[60] 505 House of Commons Debates 561, 586 (1952).

lations Committee, characterized the situation in equally strong and unequivocal terms (102 Cong. Rec. 11698):

> Mr. President, it is very important, too, that all of us recognize that the purposes of the joint resolution are fully in accord with America's traditions. A new Morocco has come into being. As it assumes the responsibilities of self-government, it is fitting that we assist it to attain a status of equality with other nations. By voluntarily renouncing the outmoded concept of extraterritoriality, we shall again demonstrate to the world our sympathy with the aspirations of those who have achieved self-government and the rights and responsibilities appurtenant thereto. The exercise of extraterritoriality to many is tinged with colonialistic connotations, which it is in our interest to erase.

b. Even if the improbable occurred and the nations in whose territories we maintain forces did consent to the establishment of Article III or legislative civilian courts within their territories, numerous difficulties would still remain.[61] A complete substan-

[61] These difficulties were summarized by Mr. Justice Clark, dissenting, in *Covert*, 354 U.S. at 87–88:

"These constitutional courts would have to sit in each of the 63 foreign countries where American troops are stationed at the present time. Aside from the fact that the Constitution has never been interpreted to compel such an undertaking, it would seem obvious that it would be manifestly impossible. The problem of the use of juries in common-law countries alone suffices to illustrate this. Obviously the jury could not be limited to those who live within the military installation. To permit this would be a sham. A jury made up of military personnel would be tantamount to the personnel of a court-

tive and procedural criminal code would have to be enacted by the Congress. Establishment of legislative courts would add a system of courts to those already in existence; it would also create new constitutional problems which at a minimum would leave in doubt for many years the legality of trials held under the new jurisdiction.

Establishment of Article III courts also would evoke many problems. Presumably a roving United States court would be provided which would try civilians in the overseas areas. If this were done, delays would be inevitable and unusual expenses would be encountered, preventing trial in all but the most serious cases unless the judge happened to be in the locality where a lesser crime was committed. There would be problems with respect to bail. Recruiting of petit and grand juries would be difficult, particularly if military personnel were exempted from jury duty, as is now the case in the United States.

In sum, exercise of jurisdiction by Article III or legislative civilian courts sitting in foreign countries

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martial to which the former minority objects. A jury composed of civilians residing on the military installation is subject to the same criticism. If the jury is selected from among the local populace, how would the foreign citizens be forced to attend the trial? And perchance if they did attend, language barriers in non-English-speaking countries would be nigh insurmountable. Personally, I would much prefer, as did Mrs. Madsen, that my case be tried before a military court-martial of my own countrymen. Moreover, we must remember that the agreement of the foreign country must be obtained before any American court could sit in its territory. In noncommon-law countries, if such courts were permitted to sit—a doubtful possibility—our jury system would be tossed about like a cork on unsettled waters."

is an impractical alternative. Agreement by the foreign country to the exercise of this jurisdiction is highly unlikely. Suitable legislation would be difficult, and even if it could be obtained it would be open to continuous constitutional challenge, to the extent that any constitutional privileges now available within the United States in Article III courts would not, or could not, be provided. Indeed, it would probably be difficult even to undertake negotiation with foreign countries unless the full extent of the substantive and procedural provisions were already known.

4. *Recall of Civilians*

One final alternative would be to employ only military personnel for overseas duty and to refrain from sending any dependents of servicemen overseas. We have pointed out (*supra,* pp. 66–67, 71–72) that this is a deceptively simple but totally unrealistic solution. It would mean that the United States would be denied the services of many competent and highly experienced employees—from clerks to highly skilled technicians, many of them irreplaceable, in any realistic sense, by military personnel. It would also mean that military families would be separated for extended periods of time, with serious effects on morale and discipline. The increased difficulty of securing capable persons who would make military life a career under such circumstances is apparent.

The sum of it is that, as to many of the offenses which may be committed by the civilian contingent overseas, the true alternative to court-martial juris-

diction is trial under foreign law in foreign courts, a solution against which Congress has opted and which creates serious difficulties and incongruities. As for offenses which are not crimes under the law of the foreign country, the alternative in all but rare instances is, in actuality, no trial at all.

III

THE PROCEDURES PROVIDED BY COURT-MARTIAL ARE FAIR

As we have just pointed out, the real choice is between trial by court-martial, on the one hand, and trial and punishment by a foreign court, or no trial at all, on the other. In this comparison, the present court-martial system does not lag behind. Whatever evils may have existed in the past, a person who is tried by general court-martial today under the Uniform Code of Military Justice is surrounded by safeguards at every step in the proceedings.[62]

When a suspect is first questioned by the military authorities or agents before charges have been preferred, he must be informed of the nature of the accusation and advised that he does not have to make

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[62] All the accused in this series of cases were tried by general court-martial, the only court-martial with jurisdiction to adjudge confinement in excess of six months. UCMJ, Articles 18, 19, 20. As a practical matter, it is rare for confinement to be executed in the case of a civilian unless adjudged by a general court-martial. Confinement of women is prohibited by regulations unless the sentence is to confinement for one year or more, as the services have no confinement facilities for women. Army Regulations 633–45, 19 August 1957; Air Force Manual 125–2, Sept. 1956, p. 29; Bureau of Naval Personnel Manual C–7813A.

any statement regarding the offense of which he is suspected, and that any statement made by him may be used in evidence against him in a trial by court-martial.[63] Unless he is so warned and actually understands the nature of the warning,[64] any statements made by him, as well as any evidence obtained through the use of such statements,[65] are inadmissable in evidence against him.[66] When the charges are preferred, the accuser must sign them under oath, stating that he has personal knowledge of, or has investigated, the matters set forth and that they are true to the best of his knowledge and belief.[67] Immediate steps are taken to dispose of the charges, and the accused is informed of the accusations against him.[68] A pre-trial investigation, judicial in nature, is held.[69] At that investigation, the accused is entitled to be represented by legally-qualified counsel,[70] without charge, and is given the opportunity to cross-examine witnesses against him and to present anything in his own behalf, either in defense or in mitigation. The investigating officer examines available witnesses requested by the accused. Statements obtained from unavailable witnesses and considered by the investigating officer must have been made under oath.[71] A

[63] UCMJ, Art. 31(b).

[64] *United States* v. *Dison*, 8 U.S.C.M.A. 616.

[65] *United States* v. *Haynes*, 9 U.S.C.M.A. 792.

[66] UCMJ, Art. 31(d).

[67] UCMJ, Art. 30(a).

[68] UCMJ, Art. 30(b).

[69] UCMJ, Art. 32; *United States* v. *Samuels*, 10 U.S.C.M.A. 206.

[70] *United States* v. *Tomaszewski*, 8 U.S.C.M.A. 266.

[71] *United States* v. *Samuels*, *supra*.

summary of the testimony taken on both sides is forwarded with the charges, and a copy is given to the accused. Accordingly, unlike the grand jury, the Government discloses its witnesses and evidence.[72] The pretrial investigation "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges."[73] Before the court-martial convening authority directs trial on the charges, he obtains the advice and recommendation of his staff judge advocate, a qualified lawyer.[74] After the charges are referred for trial, a copy is served on the accused, who cannot, against his objection, be brought to trial within a period of five days subsequent to the service of charges;[75] and, if warranted by the circumstances, additional time in which to prepare the defense case must be provided.[76]

The accused is given a prompt trial,[77] open to the public and to representatives of the press (except in the rarest of cases).[78] Presiding over the trial is an impartial, qualified lawyer—the law officer.[79] A verbatim record of the proceedings is kept;[80] if necessary, an interpreter is provided.[81] The accused

[72] *United States* v. *Craig*, 22 C.M.R. 466 (1956), affirmed, 8 U.S.C.M.A. 218.

[73] *United States v. Samuels*, *supra*, at 212.

[74] UCMJ, Art. 34(a).

[75] UCMJ, Art. 35. This provision operates in time of peace only.

[76] *United States* v. *McFarlane*, 8 U.S.C.M.A. 96.

[77] UCMJ, Arts. 10, 30, 33.

[78] *United States* v. *Brown*, 7 U.S.C.M.A. 251.

[79] UCMJ, Art. 26.

[80] Par. 82*b*, Manual for Courts-Martial, United States, 1951, Ex. Order 10214, Feb. 8, 1951, cited MCM.

[81] Par. 53*i*, MCM, 1951.

has the right to challenge members of the court for cause and peremptorily.[82] Compulsory process is available to the accused to obtain witnesses in his favor.[83] The rules of evidence closely parallel those followed in United States District Courts.[84] Evidence obtained through an illegal search and seizure or by unauthorized wiretapping is inadmissible.[85] The accused and all witnesses are fully protected by the privilege against self-incrimination.[86] The accused has the privilege of remaining silent;[87] no unfavorable inference can be drawn from his failure to take the witness stand,[88] and his silence cannot be commented upon.[89] No confession or admission which has been obtained through coercion, unlawful influence, or unlawful inducement is admissible in evidence.[90] If the accused is convicted, the court is prohibited from imposing cruel and unusual punishments.[91] Having once been tried for the offense, the accused is protected against a subsequent prosecution, either by court-martial or in federal court.[92]

If the sentence includes confinement for one year or longer, the accused has an automatic appeal from the sentence of the court-martial to a board of re-

[82] UCMJ, Art. 41.
[83] UCMJ, Art. 46.
[84] UCMJ, Art. 36; pars. 136–154, MCM, 1951.
[85] Par. 152, MCM, 1951.
[86] UCMJ, Art. 31(a).
[87] Par. 148*c*, MCM, 1951.
[88] Par. 148*e*, MCM, 1951.
[89] Par. 72*b*, MCM, 1951.
[90] UCMJ, Art. 31(d).
[91] UCMJ, Art. 55.
[92] UCMJ, Art. 44; par. 68*d*, MCM, 1951.

view,[93] with a right to petition the United States Court of Military Appeals, a civilian three-judge court, for further review.[94] In the case of a death sentence, review by the Court of Military Appeals is mandatory. In addition, at any time within one year after approval of the sentence by the convening authority, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court.[95] Even a cursory look at the decisions of the appellate bodies—decisions which in eight years have filled over twenty-six volumes of the Court-Martial Reports—will show that the appellate remedies afford the accused a powerful means of enforcing his rights. Any denial of the protections given the accused under the Code will bring swift reversal on appeal.

The accused is afforded counsel at every stage. When he is first interrogated as a suspect, he is entitled to consult with counsel.[96] At the pre-trial investigation,[97] at the taking of depositions,[98] at the trial,[99] and at each appellate level[1] he is provided, without charge, with a qualified military lawyer to represent him. He also has the right to be represented by civilian counsel.[2] If the accused is inadequately represented, the case will be reversed.[3] The entire

[93] UCMJ, Art. 66.
[94] UCMJ, Art. 67.
[95] UCMJ, Art. 73.
[96] *United States* v. *Gunnels*, 8 U.S.C.M.A. 130.
[97] *United States* v. *Tomaszewski*, *supra*.
[98] *United States* v. *Drain*, 4 U.S.C.M.A. 646.
[99] UCMJ, Art. 27.
[1] UCMJ, Art. 70.
[2] UCMJ, Arts. 32, 38(b), 70(d); par. 117*a*, MCM, 1951.
[3] *United States* v. *McMahan*, 6 U.S.C.M.A. 709.

trial and appellate process require no expenditure of money by the accused; even the necessary copies of the record of trial are furnished free of charge.[4]

Probation, parole, and clemency procedures offer the accused an opportunity to obtain substantial reductions in the severity of his sentence. The convening authority's clemency power may be exercised by disapproving any part or all of the sentence adjudged by the court.[5] The board of review can exercise discretion in determining how much of the sentence to approve.[6] The Secretary of the particular military department may remit or suspend all or part of the sentence.[7] Annual clemency reviews throughout the term of confinement may result in successive reductions in the sentence.[8] If the accused is placed on probation under a suspended sentence, the suspension can be vacated only after a hearing at which the accused is entitled to be represented by counsel.[9] If a prisoner is granted parole, he comes under the supervision of a federal probation officer.[10] The extent of the clemency and parole system is attested by recent statistics showing that the median length of time actually spent in

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[4] Pars. 82*g*, 91*a*, MCM, 1951.

[5] UCMJ, Art. 64; par. 88*b*, MCM, 1951.

[6] UCMJ, Art. 66(c); *United States* v. *Lanford*, 6 U.S.C.M.A. 371.

[7] UCMJ, Art. 74.

[8] Par. 5, Army Regulations 633–10, 22 January 1958; Air Force Manual 125–2, Sept. 1956, p. 102; Sec NAV Instruction 5810.6C, 4 Mar. 1958.

[9] UCMJ, Art. 72.

[10] Army Regulations 633–20; Air Force Regulations 125–23, 19 June 1956.

confinement by Army and Air Force prisoners in disciplinary barracks and federal institutions is only 57% of the length of the original sentences.[11]

The problem of "command influence" perhaps deserves special attention. The drafters of the Uniform Code were particularly aware of the need for assuring that the personnel of courts-martial be completely free from improper command influence in the discharge of their judicial duties. Article 37 of the Code contains a prohibition against unauthorized interference with the functioning of the judicial process, and Article 98 imposes criminal penalties upon anyone who violates that prohibition. The Court of Military Appeals has made it unmistakably clear that command control, in any form whatsoever, will not be tolerated.[12] Court-martial personnel must be completely free to perform their duties honestly and impartially. However compelling the evidence of guilt may be, the presence of command control will bring automatic reversal of the case.[13] The accused can raise the issue of command control at any point, and in support of his claim he may present on appeal new evidence which was not introduced below.[14] As the Court of Military Appeals has stated, "any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned".[15]

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[11] Army and Air Force Prisoners, Semi-Annual Statistical Report, 1 January – 30 June 1958, p. 26.

[12] *United States* v. *Hawthorne*, 7 U.S.C.M.A. 293.

[13] *United States* v. *Berry*, 1 U.S.C.M.A. 235.

[14] *United States* v. *Ferguson*, 5 U.S.C.M.A. 68.

[15] *United States* v. *Hawthorne*, *supra*, at 297.

It may be urged, however, that although at the present time the accused is afforded all the foregoing safeguards, Congress may withdraw them at any time it chooses and substitute a less fair or protective system. To that argument, there are three answers. In the first place, Congress is not free to ignore constitutional limitations applicable to trial by court-martial.[16] Secondly, Congress is hardly likely to turn back the course of development which has increasingly improved the system of military justice. Thirdly, court-martial jurisdiction over civilians could be re-examined should statutory changes remove existing safeguards. At issue here are the cases of four persons who have been tried under the present Uniform Code of Military Justice, not under some hypothetical system which Congress might possibly enact in the future.

To assume that evils which once existed continue to exist under the Code would be quite incorrect. The Code establishes a modern system of criminal law, rigorously protecting the rights of the accused. Errors and abuses may occur in any law-enforcement system. The decisions of this Court reveal instances of flagrant violation of statutory and constitutional rights by legislative, executive, and judicial agencies of the states and the Federal Government; but just as this Court and other federal and state courts stand ready to strike down abuses when they occur, the Court of Military Appeals and other military tribunals, as well as the federal courts, stand ready to preserve the honest and impartial operation of military justice.

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[16] *Burns* v. *Wilson*, 346 U.S. 137

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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AUGUST 1959.

APPENDIX

United States citizen civilian employees and civilian dependents located in foreign countries as of March 31, 1959

Country	Total civilian employees	Total dependents (of military and civilian employees)
Total	25,585	455,086
Afghanistan		19
Argentina	5	107
Australia	5	94
Austria	5	106
Bahrein		19
Belgium	52	303
Bolivia	3	58
Brazil	30	296
Burma		21
Cambodia	6	44
Canada	389	11,057
Ceylon	1	21
Chile	11	146
China	135	4,198
Colombia	15	192
Costa Rica	2	69
Cuba	265	3,381
Czechoslovakia	3	10
Denmark	54	302
Greenland	82	
Dominican Republic	4	78
Ecuador	7	126
El Salvador	2	58
Ethiopia	10	132
Eritrea	16	669
Finland	1	59
France	2,902	45,119
Germany	6,522	179,486
Ghana		1
Great Britain, United Kingdom	1,594	37,954
Hong Kong	6	58
Cyprus		121
Singapore	4	45
Bahama Islands		69
Bermuda	447	5,422
Great Britain—Continued		
West Indies and British Virgin Islands	18	500
Malta	7	374
Gibraltar		2
St. Helens (including Ascension Island)		
Greece	104	1,595
Guatemala	8	102
Haiti	4	71
Honduras	3	57
Hungary		11
Iceland	290	985
India	5	65
Indonesia		36
Iran	172	899
Iraq	1	35
Ireland		11
Israel	1	31
Italy	833	12,497
Japan	4,649	51,576
Bonin Islands	2	41
Okinawa and South Ryukyu Islands	2,230	11,935
Jordan		20
Korea	1,234	624
Laos		8
Lebanon	2	49
Liberia		13
Libya	256	4,653
Luxembourg		31
Malaya		20
Mexico	14	123
Morocco	641	7,504
Netherlands	51	903
Netherlands Antilles		2
New Zealand	1	16
Nicaragua	2	61
Norway	58	924

Country	Total civilian employees	Total dependents (of military and civilian employees)	Country	Total civilian employees	Total dependents (of military and civilian employees)
Pakistan	153	428	Switzerland	4	28
Panama	3	730	Thailand	18	555
Paraguay		54			
Peru	15	247	Tunisia		7
Philippines	672	13,087	Turkey	344	4,223
			Union of South Africa	1	18
Poland	1	16	Union of Soviet Socialist Republics		44
Portugal	28	219	United Arab Republic	9	120
Azores	195	2,315			
Rumania	2	6	Uruguay	4	90
Saudi Arabia	27	130	Venezuela	2	389
Spain	862	11,901	Vietnam	73	249
Sudan			Yugoslavia	3	56
Sweden	5	88	Location unknown		34,472

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